



Modern Piracy

Human Rights: the core of prosecution and prevention

Dissertation submitted to the Faculty of Law of Universidade Nova de Lisboa to fulfil
the necessary requirements to obtain the Master's Degree in International Law

by

Maria de Deus Cordeiro Vara Branco

Student No. 001524

Supervised by

William Kevin Sheehy

Lisbon

2014

Abstract

The definition of piracy or to define its origin in time and space is far too complicated and difficult than it has been in the recent times. This study attempts to reveal how piracy was originally perpetrated and understood, proceeded by a contemporary perspective. It also intends to identify limitations of laws and counterattacks, such as: conceptual limits, gaps, marginal strategies and other aspects. We attempt to contemplate a range of solutions to prosecute pirates, revealing the legal weakness and jurisdictional conflicts. Finally, the course of history gives us the following perception: piracy was seen as a crime if it opposed to interests of nations. The lack of interest of States to suppress piracy and its unconcern led to its entrenched, proliferation, domain and sophistication in certain regions of the globe. This work has the aim to bring the branch of human rights to the core of the problem in a three – pronged approach: piracy prohibition, suppression and roots, studying the available theories about this epidemic problem.

Keywords: modern piracy, roots, human rights, Somalia, Nigeria, responses and system dynamics

Resumo

A definição de pirataria ou a desmistificação da sua origem, no tempo e espaço, revela maiores dificuldades do que atualmente. Com este trabalho propusemo-nos a estudar como é que a pirataria era perpetrada e entendida no passado, bem como no presente. Também nos propomos a identificar limitações legais e as medidas operativas no combate à pirataria, como por exemplo: limites conceptuais, lacunas, estratégias, entre outros. Por outro lado, atendemos as soluções encontradas no combate à pirataria sem deixar de observar fraqueza da lei e conflitos entre jurisdições. Por fim, o curso da história dá-nos a seguinte percepção: a pirataria era tida como crime se fosse contra os interesses das nações. O desinteresse dos Estados para reprimir a pirataria possibilitou o seu aumento, proliferação, domínio e sofisticação em certas regiões do Mundo. O presente trabalho tem como objetivo trazer para o centro da discussão os direitos humanos numa perspetiva tripla: proibição da pirataria, supressão e raízes, aliando o estudo de possíveis respostas a dar a esta epidemia.

Palavras-chaves: pirataria moderna, raízes, direitos humanos, Somália, Nigéria, soluções e sistema dinâmico.

Anti –Plagiarism commitment

I declare by my honour that the work I am submitting is original and the references made in it are properly identified. I am aware that the non-compliance with these requirements constitutes a severe disciplinary and ethics breach.

Contents

ABBREVIATIONS	6
INTRODUCTION	ERRO! MARCADOR NÃO DEFINIDO.
1 PIRACY	ERRO! MARCADOR NÃO DEFINIDO.
1.1 HISTORICAL PERSPECTIVE	ERRO! MARCADOR NÃO DEFINIDO.
1.2 MODERN PIRACY	ERRO! MARCADOR NÃO DEFINIDO.
1.2.1. Definition of Piracy	<i>Erro! Marcador não definido.</i>
1.2.2. How pirates are labelled?	<i>Erro! Marcador não definido.</i>
1.3. PIRACY AT THE PRESENT STAGE: THE APPROACH OF TWO CASE STUDIES. ..	ERRO!
MARCADOR NÃO DEFINIDO.	
1.3.1. Piracy and the Horn of Africa and the Gulf of Aden	<i>Erro! Marcador não definido.</i>
1.3.2. Piracy and Maritime Security in the Gulf of Guinea	<i>Erro! Marcador não definido.</i>
2 CHALLENGES OF PIRACY	ERRO! MARCADOR NÃO DEFINIDO.
2.1. WHY IS PIRACY CONDEMNED?	ERRO! MARCADOR NÃO DEFINIDO.
2.2. LIMITATIONS IMPLIED BY UNCLOS' DEFINITION.....	ERRO! MARCADOR NÃO DEFINIDO.
DEFINIDO.	
2.3. INTERNATIONAL HUMAN RIGHTS A USEFUL INSTRUMENT OR AN OBSTACLE?	ERRO! MARCADOR NÃO DEFINIDO.
2.4. BRIEF ANALYSIS ON STUDY CASES	ERRO! MARCADOR NÃO DEFINIDO.
2.4.1. The Aden's Gulf: the core of oil intersection..	<i>Erro! Marcador não definido.</i>
2.4.2. Nigeria the core of foreign investment	<i>Erro! Marcador não definido.</i>
3 HOW TO PROSECUTE AND PREVENT PIRACY? .	ERRO! MARCADOR NÃO DEFINIDO.
DEFINIDO.	
3.1. THE ROLE OF UNIVERSAL JURISDICTION.....	ERRO! MARCADOR NÃO DEFINIDO.
3.2. LEGAL RESPONSE	ERRO! MARCADOR NÃO DEFINIDO.
3.3. SYSTEM DYNAMICS	ERRO! MARCADOR NÃO DEFINIDO.
CONCLUSION	ERRO! MARCADOR NÃO DEFINIDO.
BIBLIOGRAPHY	ERRO! MARCADOR NÃO DEFINIDO.

Abbreviations

ACHR	American Convention on Human Rights
BPUFF	Basic Principles on the Use of Force and Firearms
CGPCS	Contact Group on Piracy off the Coast of Somalia
ECHR	European Convention on Human Rights
EEZ	Exclusive Economic Zone
EU	European Union
GPD	Generalized Pareto Distribution
HOA	Horn of Africa
ICC	International Criminal Court
ICCPR	International Convenat on Civil and Politic Rights
ICTR	International Tribunal for Rwanda
ICTY	International Tribunal for the former Yugoslavia
IMB	International Maritime Bureau
IMO	International Maritime Organization
MPHRP	Maritime Piracy Humanitarian Response Programme
NIMASA	Nigeria Maritime Administration and Safety Agency
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery
RECOFI	Regional Commission for Fisheries
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UN	United Nations
UNCAT	United Convention against Torture
UNCLOS	United Nations Convention on the Law of the Sea
UNDOC	United Nations Office on Drugs and Crime
VCCR	Vienna Convention on Consular Relations

Introduction

The purpose of this dissertation is to contribute a reliable basis for analysing maritime piracy. After a thorough search, this paper intends to present the key points on the subject of piracy.

The definition of piracy or to define its origin in time and space is far too complicated and difficult than it has been in the recent past. If we do not want to dig or go far beyond the time of the division of the world by Pope in the fifteenth century between Portugal and Spain, it would be much easier to explain. As after the demarcation of the World, separated by two lines, decided the legality or illegality of any one plying those seas or oceans without the permission of Portugal or Spain were the violators of the laws and considered as pirates. It is altogether a different question whether they were right or wrong in terms of international laws. But the question rises was there any international law to prohibit or to permit any individual or group of individual to navigate in the sea for any purposes. Navigation was free and no one needed any permission to travel anywhere. But the division of the World by Pope Alexander VI, in 1494, during the treaty of Tordesilhas, gave exclusive powers to the two above mentioned countries which, on the basis of rights they received in the form of a Papal Bull, declared their rights of navigations and prohibition for any Catholic or non-Catholic countries. Portugal was the first to initiate and exercise its power over the discovered countries by providing them a *Cartaz*, which could be explained as a passport for navigation from one place to the other, paying the legal taxes or customs to the Portuguese authorities. This *Cartaz* has exclusive features: who the captain was, the name of the ship or ships, crew members, their nationalities or origin, merchandise permitted to import or export. All those ships navigating without the *Cartaz*, were subject to confiscation of their merchandise or goods and were only allowed to navigate after the payment of customs/duties. In many cases, they were burnt and destroyed if they resisted the Portuguese ships demanding to show the *Cartaz*. On the other hand, those who disobeyed the Portuguese authorities were considered as Pirates, since they escape the payment of duties. This system was known as *Mare Clausvm* or the sea is

close. In general, Portuguese faced a lot of resistance from the Asian countries in the Indian Ocean region where they found an organised political and navigational system. They did not obey the Portuguese or they did not think right or logical for the Portuguese to collect taxes over their goods and prohibiting them to ply, although they were having the support of their local governments. However, the Portuguese theory of *Mare Clausvm* was refuted by Hugo Grotius towards the end of the sixteenth century, claiming that the seas are open for all, and his theory cost him his life.

Once this theory was refuted, there was a Portuguese answer by Frei Serafim de Freitas, *Do Justo Império Asiático* in 1625, which was earlier elaborated by João de Barros, the well-known Portuguese chronicler and theorist. Later, in 1635 the theory of John Selden appeared, who wrote: “An abridgement of all the Sea-Laws”, which denied the right of all other theorist but the right of the English over the entire world. After this a number of theories were presented by several authors. But the main theory which dominated the International laws was “Might is Right”. The powerful countries dominated the weaker and justified their rights by force. Anyone or any country could be called pirates, robbers or any name that the dominating country wanted to give. The rights of the weak sovereigns put to a stake. Just for examples all the Asian ships in the Indian Ocean were called holding pirate ships, from Mozambique till China, during the sixteenth and the early twentieth century.

We here, therefore, would like to focus on, as a much as it is possible to study, in the following passages, the origin and theory and the Laws about Piracy without giving a chance of supporting is biased theories to justify, the right of navigation or whosoever, try to deprive the others’ right for navigation. In principle, as will be seen, the pirate is someone who tries to take over a ship or ships by force without having any right for the same. Or, the one who tries to capture some ship or ships without any lawful right for the same. But, in general, piracy, or the sacking or looting of ships always existed since time immemorial. We hear about the existence of piracy as early as during the Roman period even much before, at least since the human race started its commercial and navigational activities.

Soon after, when people started to develop consciousness about the differences between right or wrong, different laws to prohibit such activities developed. And as

time passed by, piracy accompanied the scientific developments, so did the measures and laws to control it.

The main purpose and the theme of this dissertation is to describe piracy and to show why some international laws and efforts to control piracy appeared, such as for example the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and other, important international laws against piracy. Nevertheless, as we have mentioned before, about the sixteenth and seventeenth centuries laws and discussions, there have been uncountable amount of laws and prohibitions that have appeared according to the necessities of the time, until 1982. But here, we would like to focus mainly on the UNCLOS and its policies which have been adopted by some countries and not others. We have also tried to see if this law could make any change in the mentality of the pirates and their actions changed or they were discouraged by this and they modified their course of action fearing the implications and punishments. But as it has been understood through our study, most of its clauses were subject to the adaptation by the States or governments itself, it could bring the results which had been expected to have by these laws. Moreover, the biggest challenge is our concern about the applicability of international human rights during the suppression of piracy.

The first chapter provides a chronological development or a historical background of piracy through the ages. We aim to identify the roots of piracy and how it continued century after century and still exists. Once we have studied its historical background, we would like then to discuss various scholarly discussions about this theme. At the end of this chapter, we are going to analyse a few case studies of modern piracy.

The question arises why even at the present moment different maritime nations have not been able to stop maritime piracy in the Horn of Africa (HOA) and the surrounding Gulf of Aden in East Africa and in other parts of the world. The international community, nowadays, is facing a rather sophisticated armed piracy on a considerably higher level than earlier. The question is to how tackle this present situation and what methods can be applied for an effective combat against piracy if even the nations like United States and other maritime nations fail to do away with it. Ships of all the countries, their crew and the economy of States are at stake and facing a great danger due to the threats of pirates.

The second chapter will study the present political and economic barrier has created endangering day to day life. Several countries have divided and built up their own opinion for and against. But before we introduce all those issues that piracy has raised, another approach will be presented, the concern about the violation of human rights that the pirates have imposed. Moreover, we also aim to discuss the Human Rights of the pirates as defended by the Human Rights organisations. In certain cases it often appears that Human Rights Activist, worry more about the Pirate's Civil rights than those of victims!

Closer attention is going to be given to the some of the recent cases of piracy committed by the Somalis and Nigerians and the relevance of countermeasures adopted in those regions. Furthermore, pirates' attacks will be distinguished in their forms of operations from one place to the other. If, in 1993, the International Maritime Organization (IMO) conducted a study that defined a pirate typology applicable to all locations, such as: 1) low-level armed robbery: opportunistic attacks mounted close to land, 2) medium-level armed assault and robbery: piracy carried out further from shore, often in a narrow sea-lanes, with a high probability of using violence, and 3) major criminal attack: well-resourced and smoothly run operations in which violence is commonly employed, not only to rob money or goods from a ship, but to confiscate the ship itself. Currently, hijackings and hostage-for-ransom situations has given a new dimension to piracy in the Horn of Africa and Gulf of Aden. Even though violence is common, hijacked crews are more likely to survive the encounter because they are worth more, alive than dead. Geography plays an important role in what type of piracy is most likely to be carried out. The Gulf of Aden is an area that occupies over 2.5 million square miles of ocean whose neighbouring States include Yemen, Ethiopia, Somalia, Kenya and Tanzania along the Gulf of Aden, making it one of the most important waterways in the world, as it links the Indian Ocean to the Red Sea and Suez Canal.

The third chapter will try to present the possible of solutions to prevent piracy and punish pirates. This Chapter will also discuss legal weaknesses and jurisdictional conflicts. It has been noticed that the International law and the laws of nations regarding piracy many times are considerably incompatible, and thus, create legal obstacles that minimises accountability and provide the perceptions of weaknesses. In addition, an

effort will also be undertaken to study the simulations made by the theorists Barry and Staver, who through system dynamics attempt to uproot piracy.

1

Piracy

In the Indian Ocean, after the arrival of the Portuguese on the western coast of India, the Portuguese treated all the sea-going merchant ships as illegal and pirates who did not have their *Cartaz*¹, as has been mentioned earlier. Later we find in the Atlantic and in the Indian Oceans towards the end of the sixteenth and early seventeenth centuries, a number of Portuguese ships were sacked and robbed and looted by the English and the Dutch whom the Portuguese called pirates, but the British and the Dutch considered it their right of navigation and sacking other ships was lawful and highly respected in those countries. Taking the case of Sir Francis Drake of England, for example, he was highly appreciated, respected and was granted the title as “Sir” by Queen Elizabeth I. He was never punished, although he looted and sunk so many Portuguese ships.

Currently, we hear more about piracy than we did in earlier days. During the nineteenth and the twentieth centuries the world lived under the *Pax Britannica*, since in the eighteenth century, the British Royal Navy had taken measures to suppress piracy. Nevertheless, it is important to keep in mind that piracy throughout that period had been supported by European Sovereignities, which in turn led to the development of the practice of privateering to piracy². But, later on, to counter this reality, the supremacy of the English Empire brought a significant change maritime legal practice (development of Admiralty Courts and Navy). The same practice of controlling the ships, in its more human form, on the other hand, was also adopted to suppress slave trade. The law against the slave trade was created in 1807³.

¹ Afzal Ahmad. *Portuguese Trade and Socio-Economic Changes on the Western Coast of India 1600-1663*. New Delhi, India, Originals, 2000, pp. 33-60. And Afzal Ahmad. *Indo- Portuguese diplomacy during the 16th and 17th centuries (1500-1663)*, New Delhi, India Originals, 2008, pp. 51-70.

² Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. v.

³ Jenny S. Martinez. *The Slave Trade and the Origins of International Human Rights Law*. New York: Oxford University Press, 2012. p.3.

This aggressive approach by the British Royal Navy, in order to suppress piracy, spread a general feeling that maritime piracy had been banished forever. For many scholars the discussion about piracy as a crime became obsolete. Piracy was only mentioned as an historical fact and pirates as enemies of all mankind – *hostis humani generis*.

In a relatively short period of time, phenomena, such as globalisation and extremely sophisticated *mass media*⁴, revitalised the ideology about piracy, which had been thought to be extinct. The international community became aware of transnational crimes and as well the growth of piratical attacks, thus the International Legal Order faced new challenges. Policing the seas, nowadays, requires far more endeavours from States, on the same pattern as those required to curb terrorism⁵. As Anthony Giddens notes “[t]he American sociologist Daniel Bell (...) says that the nation becomes not only too small to solve big problems, but also too large to solve the small ones”⁶. This statement highlights the weakness of an isolationistic policy and the need for a wider cooperation.

1.1 Historical Perspective

Classical authors, such as Herodotus, always made reference about the practice of piracy. Classical scholars identify piracy “as a product of uncivilized societies”⁷, meant to be suppressed by civilised societies. The historiographer Philip Charles de Souza defines piracy as an act of “armed robbery involving the use of ships”⁸. This assumption leads the author to demystify what the classics described as an act of piracy in their speeches, which varied from banditry to plundering.

Linguistically, piracy and banditry were words too similar in the ancient time, especially in Greek, for example “*Leistés* and *Peiratés* can be translated as pirate”, but also as banditry. Although, there was the word *Katapontistés*, which literally meant pirate, Hellenics did not make use of said word for it was considered to be too rude. On

⁴ Alberto M. Vara Branco. *O Contributo dos Mass Media no Ensino da História*. Lisboa: IIE, 2002. pp.76-81.

⁵ Anthony Guiddens. *Runaway World: How Globalisation is Reshaping our Lives*. 2nd. London: Profile Books, 2002. p. XVII.

⁶ *Ibid.*, p.13.

⁷ Philip Charles de Souza. *Piracy in the Ancient World: from Minos to Mohammed*. Ph.D Thesis in History, London: University of London, 1992. p. 19.

⁸ *Ibid.*, p.13.

the other hand, Latin presented fewer difficulties, for example *Praedo* and *Pirata*⁹. Differently, when carried out by the Tyrrhenian, followed by the Cretans and then the Sicilians, piracy was seen as a legacy. The last ones were the most savages, not even showing the slightest respect for what was considered sacred at the time¹⁰.

Subject of speeches, philosophical or fictional works, and piracy had prompted out an ambiguous gaze. If some admired it, others condemn it, expressing said condemnation in their works, such as Homer in *Iliad* and *Odyssey* and Cicero in his speech to prosecute Gaius Verres (70 B.C.). Verres as a governor (of Sicily) did not attempt to stop and punish pirates and for his misconduct Cicero connected Verres to piracy¹¹. Later, in seventeenth century, Grotius in *On the Law of the War and Peace*, states that those who violate the law of nature and the law of nations must be punished and sovereigns ought to prosecute enemies of mankind¹². The origins of piracy are correlated to the flourishing of maritime commerce. This explains why the rate of piratical attacks has always been related to the growth (or not) of commerce. This is not an assumption recognised nowadays, but something that Strabo recognised between 63 B.C. and A.D. 21.

Greeks struggled with piracy, but it was in the Roman Republic that harder measures were taken. Pompey is known to have fought a “Naval War” against Sicilian pirates¹³ and had almost vanquished piracy from the Mediterranean (66 B.C.).

If some authors notice that piracy was seen as a profession praised by the Sicilian nobility, others saw it as a way to increase personal incomes; authors such as Strabo identify poverty¹⁴ as a source of piracy. Strabo also pointed out corruption as another source, but corruption had already been pointed out by Cicero in the prosecution of Verres. Another source of piracy was unlawful governments.

⁹ *Ibid.*, pp. 27-51

¹⁰ Abel N. Pena. *Espártaco Epicteto e outros Escravos: Pirataria e Escravatura na Roma Antiga*. Vultos da Antiguidade. Edited by coord. Marina Cristina Pimentel. Sintra: Editorial Inquérito, 1996. pp. 10-19.

¹¹ Philip Charles de Souza. *Piracy in the Ancient World: from Minos to Mohammed*. Ph.D Thesis in History, London: University of London, 1992. pp. 166-167.

¹² Hugo Grotius. *On the Law of War and Peace*. Translated by A.M. A.C. Campeell. Ontario, Canada: Batoche Books, 2001. p. 207.

¹³ Sicilian piracy is one of the most noticeable cases of piracy in the ancient world, because piracy was considered a profession of nobility and warriors. In Abel N. Pena. *Espártaco Epicteto e outros Escravos: Pirataria e Escravatura na Roma Antiga*. Vultos da Antiguidade. Edited by coord. Marina Cristina Pimentel. Sintra: Editorial Inquérito, 1996. p. 10. And Philip Charles de Souza. *Piracy in the Ancient World: from Minos to Mohammed*. Ph.D Thesis in History, London: University of London, 1992. pp. 83-85.

¹⁴ Philip Charles de Souza. *Piracy in the Ancient World: from Minos to Mohammed*. Ph.D Thesis in History, London: University of London, 1992. p. 94.

In the beginning, piracy and warfare were not distinguishable; it was not until States started to settle their boundaries and unify internal forces that a difference emerged. Having their own armies, meant States no longer needed piracy as an ally. Whether the emergence of States in the ancient world clarified one practice over the other, the reality is that States continued to engage and sponsor piracy. Piracy, when allied to a State, could be seen as an act of undeclared war¹⁵, not only in the Ancient world, but throughout human history.

However, whether piratical attacks exceeded boundaries settled by States or were autonomous of any alliance, piracy was seen as a selfish and despicable activity that should be suppressed and banished. Acts of kidnapping, ransoms, sacks and violent robberies were the *modus operandi* of pirates.

Piracy has always been seen as a threat, which no one could escape. Even, Julius Caesar was kidnaped and remained in captivity for forty days until a ransom was paid (76-75 B.C.).

During the Roman Republic, Pompey was the one that released Romans from piracy. Nonetheless, it was only in the *Principate* that the threat was absent from Romans' lives. Concomitant with Augustus's power, piracy disappeared and the outburst of any piratical incident would be rapidly suppressed -*Pax Romana*-.

Nevertheless, the fall of the Western Roman Empire dictated, once again, the outbreak of piracy. In the middle ages, several safe-ports and "States" emerged to support piracy. Vikings engaged in piratical raids in the North of Europe and along the Iberian Peninsula's coast.¹⁶ In North Africa, pirates were settling down States to support their activities. Later, in the Indic, Madagascar¹⁷ pirates led several attacks on the route from Europe to India. Consequentially, the Caribbean Sea was known to have had the most powerful fleet of pirates on earth. Tortuga, at the time, was considered a Pirate Republic (fifteenth-seventeenth century). This powerful fleet appeared as a form of retaliation to the Spanish monopoly.

¹⁵ Philip Souza. *Piracy in the Ancient World*, pp. 105-106.

¹⁶ Alfred P. Rubin. *The Law of Piracy*. Newport, Rhode Island: Naval War College Press, 1988. p.307.

¹⁷ Libertatia Republic is another full-scape state of pirates. It is believed that heterogenic population lived there under a libertarian-egalitarian regime. Being described by the romancist Daniel Defoe and an incongruity in dates given open the question whether Libertatia really existed.

Limited resources precluded States from creating a navy with the sole purpose of protecting the merchant marine from enemy attacks. This security gap was closed through the creation of legal concepts such as: Letters of Marque, Commissions for Privateering and Prize Law¹⁸.

The Golden Age of Piracy arose as a consequence of excessive commissions given to privateers and from the loss of control by States. Conversely, by the seventeenth century Letters of Marque were recognised as belligerent acts.¹⁹ These letters were the first legal instrument used to refund a merchant in case of loss of cargo and/or ship as a consequence of a naval enemy attack. The “plaintiff” should at first address to the offender State. If this attempt failed the next step was to readdress his complain to his own State in order to initiate diplomatic channels. Failing results from diplomatic channels, a Letter of Marque was issued by the “plaintiff’s” sovereign. This letter legitimised the captor²⁰ to seek direct restitution by attacking the trade of the offender state.

When it was no longer possible for the issuance of Letters of Marque, States started to sponsor armadas, known as privateers, during a war. Their main target was the enemy’s maritime commerce; through the raid or plunder of merchant vessels, privateers would get their prize. This was a way to weaken the enemy power and at the same time engage in a naval war without spending treasury resources. Prizes’ value started to be controlled by the ally nation, at first under the authority of the crown and then by the National Prize Courts. So, the regulation of prizes developed into a “system of laws applicable to the capture of prize at sea, dealing with such matters as the rights of captors and the distribution of the proceeds”²¹.

Elleman [*et al.*] presents two leading reasons for the uprise of piratical attacks in the seventeenth-eighteenth centuries: the British Navigation Act of 1651²², and the

¹⁸ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 12.

¹⁹ *Ibid.*, p.4.

²⁰ Captor is defined as the “Holder of a letter of marque”, *see supra* note 18.

²¹ Bryan A. Garner. ed. *Black's Law Dictionary*. 8th. Thomson West, 2004. p.1238.

²² Cromwell enacted Navigation Act of 1651 with the intent to impoverish the Dutch’s trade. In that way settled that only British ships could do coastal trade and to transport certain goods, such as sugar and tobacco, from the metropolis to the colonies and *vice-versa*. English government enacted this act beyond others aiming to control trade overseas and promote it. Historians established the navigation act of 1651 a mark that turn the British merchant fleet, but uncertainty remains. In *The New Caxton Encyclopedia*. Vol. 14. London: Caxton & English Educatinal Programmes International Limited, 1986. pp. 139-140.

refusal of privateers to cease their activities after the ratification of the Utrecht Treaty (1713).

The upsurge of imperialism brought what we today call an “economy of world scale”. With vast domains from West to East a powerful fleet was required to protect mercantilists’ aims. Empires overseas demanded higher control, this time not by autonomous naval forces, which could easily disrupt settled bounds from empires’ control. Moreover, maritime legal practice took new steps. States began to empower their naval fleet, and, attacks on the commerce were no longer acceptable in the international community. Also imperialist powers agreed to forbid privateering practices (Declaration of Paris, 1856)²³.

Whether England was one of the major sponsored-States of piracy, it was the first nation of the Modern World to police the seas, suppress piratical attacks and other activities that in time proved to be and were recognised as inhuman. *Pax Britannica*, revealed the hegemony of British Royal Navy and the monopoly of maritime trade routes.

1.2 Modern Piracy

At the present time, maritime piracy is more than a theoretical threat, it is a reality on the forefront. Self-interest and a hypothetical demise for a while led States to overlook piratical incidents as a reality. But once their economic interests were in risk, another glance was the development of the concept of modern piracy.

Modern Piracy affects economies, maritime safety as well as the policy of *Mare Libervm* policy, international commerce and the marine environment. Not only does it bring material concerns, but mostly it violates human rights. Some argue that an intersection of international branches may result in a better approach.

Television channels around the world report news and documentaries concerning piracy. Their aim is not only to present news in order to inform, but also to appeal to the receptivity, judgement and concern of States and individuals. So, it is a way to shock the international community. In the midst of this one question arises: What is piracy? An international crime or a transnational crime: academics are divided.

²³ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 8.

Despite this divergence, piracy was first acknowledged as an offence against the law of the nations, but later on, it was degenerated into *hostis humanis generis*²⁴. Thus, one thing has been established: piracy is morally condemned, but is this sufficient to characterise piracy as an international crime?

Nevertheless questions arise: What are the exact numbers of attacks? Can we exactly calculate? The use of different definitions by IMO and International Maritime Bureau (IMB) weakens and intensifies the misunderstanding and distorts the real numbers of piratical attacks that take place in a certain area during a certain period of time. International entities are not the only ones that adopt different definitions; domestic systems have also their views on piracy, and they may be or not compatible with definitions established at an international level. Furthermore, the absence of reported attacks by shipowners is another reason. Shipowners' apprehensions are related to the delay of ships schedule and escalation of insurance premiums due to investigation.

1.2.1. Definition of Piracy

Piracy does not embrace any consensus, not even around its qualification. Cassese²⁵ does not qualify piracy as an international crime. Cassese establishes at least four prerequisites to identify an international crime, prerequisites piracy fails to fulfil. Since piracy is not repressed on behalf of a common value, States remain legitimised to punish those acts which are inflicted upon them. Likewise, piracy does not share the levels of heinousness of international crimes. Cassese makes his exposition in the past, since he considers piracy an "obsolete" crime. Cassese adopts this position at an embryonic stage of modern piracy.

Kraska²⁶ embraces the views of Cassese. He is of opinion it is an "error of legal analysis" to pursue maritime piracy as an international crime. Kraska agrees that piracy should be prosecuted under domestic law and States should cooperate on the grounds of universal jurisdiction. Its refusal to accept it as an international crime relies on the lack of jurisdiction of international courts or tribunals to prosecute it.

²⁴ Tom Obokata. "Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression." *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). pp. 19-20.

²⁵ Antonio Cassese. *International Criminal Law*. Oxford: Oxford University Press, 2003. pp. 16-25.

²⁶ James Kraska. *Contemporary Maritime Piracy: international law, strategy and diplomacy at sea*. California: ABC-CLIO - Praeger, 2011. pp. 105-108.

On the contrary, Bassiouni²⁷ reminds us that piracy was the first international crime to be recognised as such. However, in a historical perspective he demonstrates that international criminal law had not developed as a unified system - the criminalization of certain conducts appeared as a result of specific situations –*ad hoc*–; and without regarding if there is a univocal definition of international crime or its absence –“haphazard”-. Although, considering a lack of consensus among scholars, Bassiouni prompts out a formula to define international criminalization and even tests it. His methodology led him to identify and categorise international crimes. From the twenty-eight categories detected, Bassiouni groups them in “international crimes, international delicts and international infractions”; this distinction is useful because each group adopts different policies and different penalties. Piracy integrates international delicts²⁸, however he observes that this category may integrate “truly international crimes” when aggravated –the crime threatens or violate common values: such as peace, security and/or human dignity; or demands the cooperation of several jurisdictions once its effects goes beyond States boundaries- . Therefore, it will rely on a valuable judgement made by States. However, this valuable judgment *per se* does not fulfil legal demands.

Cryer²⁹ [*et al.*] identifies the core of international crimes as those prosecuted under the jurisdiction of international courts or tribunals. He does not comprise piracy in that framework because of a methodological option. Cryer [*et al.*] follows the same view of Bassiouni and finds all the argumentation around international crime fallacious, besides the lack of cooperation and consistency in international law does not provide bases to precisely identify international crimes. Based on this conjuncture, nothing prevents on transnational crime being classified as an international crime in the future, it will only depend on how States value the protected principles.

Despite the disagreement between authors we perceive piracy as an international crime rather than a transnational crime. The reasons for this position rely on the escalation of violence used during piratical attacks, which has been threatening world security and even economy, and consequently the effectiveness of the measures taken or

²⁷ M. Cherif Bassiouni. *Introduction to International Criminal Law*. New York: Transnational Publishers, Inc., 2003. pp. 109-149.

²⁸ “Those international criminal law normative proscriptions that affect an international protected interest, and whose commission involves more than one state or harms victims from more than one state” in M. Cherif Bassiouni. *Introduction to International Criminal Law*. New York: Transnational Publishers, Inc., 2003. pp. 122-123.

²⁹ Robert Cryer, [*et al.*]. *An Introduction to International Criminal Law and Procedure*. Cambridge: Cambridge University Press, 2007. pp. 1-6 and 281-283.

its momentaneous success. However, this remains to be discussed in a later chapter for we cannot conclude without first clarifying how we identify piracy and how it suits reality.

UNCLOS' definition outlined in the following paragraph is the one we choose to guide our work. Notwithstanding its wide acceptance as a customary rule, scholars have since the beginning criticised how the codified rule narrowed it. In other words, it does not accomplish the amplitude of the customary rule, even though, it is the one that accomplishes wider consensus and has been gradually adopted in domestic systems, and as is the case of the United Kingdom, Belgium, France, Tanzania and Seychelles³⁰.

According to UNCLOS statements in its article 101

“Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

Taking into consideration this definition and the article 15 of the Convention on the High Seas³¹ four elements are required to subsume a conduct as piracy, as Guilfoyle identifies:

³⁰ PILPG. “Piracy Definitions in Domestic and Regional Systems.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. pp.8-20. *Available at* https://www.google.pt/search?q=pirates&oq=pirates&aqs=chrome..69i57j0l5.1303j0j8&sourceid=chrome&espv=210&es_sm=93&ie=UTF-8#.

³¹ Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

- a) “an act of violence, detention or depredation;
- b) committed for private ends;
- c) on the high seas or in a place outside the jurisdiction of any state; and
- d) by the crew or passengers of a private ship or aircraft, against another vessel or persons or property aboard.”³²

Nevertheless, we must abridge the points presented in the article 101, mentioned above, with the articles 58(2), 102, 103 of UNCLOS in order to understand all the elements of piracy. Firstly, offences must encompass the following acts: violence, detention or depredation. Secondly, it must be meant for private ends, which many of the academics narrow definition into personal gains (acts that rely on political aims cannot fall in the definition of piracy) (*infra* 2.2.). Thirdly, offences must take place within a precise geographic area: high seas or outside of any jurisdiction or Exclusive Economic Zone (EEZ) [58(2)]. Fourth, the crime requires at least two vessels. Fifth, the offender must be a pirate ship (103), which means a private ship ruled by pirates and it must pursue the conducts defined in article 101. In addition, a public ship –warship or government ship (102) - may also perpetrate piratical attacks if a mutiny occurs and the vessel starts to be used to commit the offences in article 101³³.

UNCLOS restrains the scope of the customary rule. Conversely, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) is known for its broadness. It does not specify piracy, but embraces it in the role of offences established in article 3. Furthermore, it enlarges its scope adding the following acts: seizure and “control over a ship by force”[3(a)]or, performing “an act of violence against a person on board a ship” [3(b)], which means that it does not require two vessels in the scenario, thus mutiny is not excluded. Besides, any of those offences also fall in the concept of piracy if perpetrated in territorial waters [4(1)]. The lack of precision led us to conclude that subjective motivations are also embraced by the SUA

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

³² Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. pp. 27-28.

³³ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. pp. 29-45.; Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operating off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011.pp. 5-7.; and Michele Ameri. “Current issues in the repression of piracy under international law.” Presentation in World Oceans Day, Division for Oceans Affairs and the Law of the Sea, United Nations, New York, 17 May 2013. Slide show: 12-15. Available at http://www.unfalumni.org/wp-content/uploads/2013/05/piracy_current-issues_2013.pdf.

Convention, which means that religious, political or economic intents are of no relevance. Incidentally, the SUA Convention appeared in reaction to the case *Achille Lauro* and other attacks relying on political motivations.

However, the SUA Convention is unsatisfactory on jurisdictional grounds. UNCLOS contemplates universal jurisdiction in article 105 –“every state” has the responsibility to act in order to prosecute pirates and restore peace and safety navigation. In contrast, the SUA Convention demands principles of territoriality and nationality in order for a State party to exercise its jurisdiction, article 6. Finally, we ought to mention that the SUA Convention is an instrument to prevent and suppress terrorism, as its preamble highlights³⁴.

Lastly, the IMB definition of piracy, until 2009, adopted the following definition: "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act"³⁵, its scope was broader than those codified in UNCLOS and SUA Convention. The IMB definition had been broadly used in its statistics and by the *mass media* to report the number of piratical incidents worldwide. Besides, the flaw with the IMB is that it did not have any legal effect³⁶. Since 2010 IMB adopted the definitions codified in UNCLOS and IMO³⁷. On the other hand, IMO, since 2009, adopted into its Code of Practice the definition adopted by UNCLOS³⁸.

1.2.2. How pirates are labelled?

The legal treatment of pirates raises several concerns. Depending on the qualification of their legal status we will know what measures to pursue. There is a

³⁴ Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp. 9-11; And PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. pp. 6-8. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

³⁵ International Chamber of Commerce, International Maritime Bureau, Piracy and Armed Robbery against Ships, Annual Report 1 January-31 December 2009 (January 2010), p. 3. Available at https://wikileaks.org/gifiles/attach/131/131106_2009%20Annual%20IMB%20Piracy%20Report.pdf

³⁶ Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp.11-12; And Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. pp. 10-13.

³⁷ International Chamber of Commerce, International Maritime Bureau, Piracy and Armed Robbery against Ships, Annual Report 1 January-31 December 2009 (January 2011), p. 3. Available at <http://www.steamshipmutual.com/Downloads/Piracy/IMBPiracyReport2010.pdf>

³⁸ Resolution A.1025(26) 2 December 2009 available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/A.1025.pdf>

divergence on how pirates should be labelled³⁹. They have been seen as: criminals for some, combatants by a minority, and others attempt to classify them as civilians.

First of all, there are no grounds to label pirates as combatants. It is legally established that pirates do not endorse any political view and there is no intent in perceiving a government. Targets of pirates are independent of the flag pirate vessels fly. On the other hand, combatants can only target vessels that belong to the government they are struggling against. By the same token, combatants cannot attack civilians nor kidnap them. Those actions are outlawed by international humanitarian law. Moreover, insurgents are liable for any illegal act on the grounds of State Responsibility⁴⁰. Pirates are not constrained by the aforementioned⁴¹ limits. Moreover, pirates are not under the authority of a government, neither are they allied to a State. Thus, pirates cannot be prosecuted by admiralty courts, and no military force can be used to suppress them. Even though, Kontorovich notices that pirates fulfil some of the requirements of article 4 of the Third Geneva Convention, once seizure and hijack-ransom pirates attacks entail: “(a) that of being commanded by a person responsible for his subordinates; (...) (c) that of carrying arms openly;”⁴². Concerning to “(d)... conducting their operations in accordance with the laws and customs of war”⁴³ Kontorovich states “[a]nd while they do not observe all the rules and costumes of war, they often treat captures crews reasonably, providing basis for the argument that they would abide by the rules of reciprocity.”⁴⁴, however as we are going to see *infra* the treatment inflicted is far beyond of being reasonably and acceptable in terms of international human rights and humanitarian law. Besides, pirates no longer incarnate the image of pirates from the Golden Age of Piracy (eye patches, hook, wooden stump, feathered tricorne, kerchief, parrot...) neither raise the Jolly Roger flag when engage in an attack, so nowadays they do not fulfil the requirement of “(b)...a fixed distinctive sign recognizable at a

³⁹ Saoirse De Bont. “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. p.13. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

⁴⁰ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. pp. 33-40.

⁴¹ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. pp. 33-40. ; and *supra* note 33.

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol III), art. 4(2) in <http://www.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument> accessed on 27 November 2013.

⁴³ *Ibid.*

⁴⁴ Eugene Kontorovich. ““A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists.” *California Law Review* vol. 98, no. 1 (February 2010): p. 260.

distance”⁴⁵. Attending to aforesaid, piracy does not satisfy the requirements of an international armed conflict⁴⁶ and since combatant status is only recognised in armed conflicts of an international nature, pirates do not acquire combatant status⁴⁷. Hitherto, piracy has also not been qualified as a non-international armed conflict⁴⁸, since there are no grounds to sustain the existence of an armed group against a government neither reached an intensity level of violence⁴⁹. Even though, if we classify pirates as combatants most of the strategies adopted to counterattack piracy would be fruitless, because pirates will be in their legal right to attack and use force against the other party and immune from criminal prosecution⁵⁰.

Secondly, pirates cannot be labelled as civilians. Civilians are those individuals who do not take direct part in hostilities; there is no intent to inflict harm to the other party. Meanwhile, pirates perpetrate unlawful acts so that they shall not be immune to any attempt to stop their activity. In addition, civilians are regarded as having a vulnerable status⁵¹, since they do not share the same resources to defend themselves. In contrast, pirates have been arming themselves to attack random targets with the aim of obtaining gain. Modern international law admits that pirates are seen as civilians and when considering international human rights and international humanitarian law, the extrajudicial killing is precluded and it can only be accepted in self-defence cases. Outside this scope it is considered unlawful. In addition, UNCLOS determines that criminal justice system is the only one that can be applied for cases of such nature⁵².

⁴⁵ See *supra* note 39.

⁴⁶ An international armed conflict (IAC) “occurs when one or more states have recourse to arm forced against another state, regardless of the reasons or the intensity of this confrontation. (...) Moreover, no formal declaration of war is required. The existence of an IAC, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions.” by International Committee of the Red Cross (ICRC) Opinion Paper March 2008, p. 1. Available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>

⁴⁷ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. p.8. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

⁴⁸ Non-international armed conflicts “include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. (...) the situation must reach a certain threshold of confrontation...” by International Committee of the Red Cross (ICRC) Opinion Paper March 2008, p. 3. Available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>

⁴⁹ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. pp. 10-13. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

⁵⁰ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. p. 13-14. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

⁵¹ Larry May. *War Crimes and Just War*. New York: Cambridge University Press, 2007. pp. 172-176.

⁵² Eugene Kontorovich. ““A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists.” *California Law Review* vol. 98, no. 1 (February 2010): pp. 256-259.

A third classification was developed as a result of the war against terrorism engage by the United States of America (USA), which is “unlawful combatants”. Since terrorist, like pirates, were in so called grey-zone, this category was formulated in order to respond to the specificities of the conflict. This classification denies rights and privileges given to a combatant, more precisely and alarming denies the right of being recognise as a prisoner of war (POW)⁵³. However, the USA did not deny the protection of the Geneva Convention to pirates⁵⁴.

Therefore, pirates should be classified as criminals. UNCLOS recognises pirates as private individuals to be prosecuted under the jurisdiction of criminal law. And as such, counter-piracy operations cannot exceed reasonable force. Although States endorse the use of “all necessary means”, by the Resolution 1816, to suppress Somali piracy, this does not legitimates the use of lethal force, for example military forces cannot sink a pirate vessel⁵⁵. Otherwise, such States’ actions would be classified as unlawful. So, the nature of counter-piracy measures can only rely on police powers⁵⁶. However, this police nature does not prevent the use of a military naval force to seize pirate vessels, once we must take into consideration economic and human constraints, for instance the absence of a trained and specialised police to counterattack⁵⁷. Moreover, such practice is allowed according with the first principle⁵⁸ of the Basic Principles on the Use of Force and Firearms (BPUFF) and articulating with the commentary to article 1 of the Conduct of Law Enforcement Officials:

“(a) the term ‘law enforcement officers’ includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

(b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition

⁵³ See *supra* note 46.

⁵⁴ See *supra* note 41.

⁵⁵ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. p.6. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

⁵⁶ Douglas Guilfoyle. “The laws of war and the fight against Somali piracy: combatants or criminals?” *Melbourne Journal of International Law* vol. 11, no. 1 (May 2010): p. 10. Available at <http://www.law.unimelb.edu.au/files/dmfile/download9cf01.pdf>.

⁵⁷ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. p.5. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

⁵⁸ “1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. (...)” available at www.ohchr.org/Documents/ProfessionalInteres/firearms.pdf

of law enforcement officials shall be regarded as including officers of such services.”⁵⁹

1.3. Piracy at the Present Stage: the approach of two case studies.

Around the beginning of the twentieth century a new epoch seemed to be drawing cases of modern piracy and piracy suppression in terms of strategy and operational decisions adopted. In 1992, 3583 piracy incidents were estimated at a global stage, and from 1993 to 2005 there has been an increase of 168 %, observes The United Kingdom’s House of Commons Transport Committee⁶⁰.

1.3.1. Piracy and the Horn of Africa and the Gulf of Aden

Nowadays, Somali is going through a chaotic and alarming phase due to the organised attacks. Gary E. Weir states that in this region naval forces (US Naval Forces, Central Command and Combined Task Force 150 *inter alias* NATO) deal with geographical and jurisdictional difficulties⁶¹. Another reason for the escalated numbers of incidents of piracy is the result of the closeness of “unstable nations”. But the main reason for the escalation of piracy relies on the politic-economic environment.

Aware of the situation, the IMB appealed for the cooperation of countries equipped with resources to combat piratical operations, such as the United States and the United Kingdom. Piratical attacks started to menace international commerce, ships of medical and food supplies (from World Food Programme) and the “traffic that supports American forces to Iraq”⁶². Thus, this had to stop somehow.

Somali Republic appeared in 1960 with a democratic model which was overshadowed in 1969 by the dictator General Muhamad Siad Barre. Siad Barre organised a maritime force in order to preclude illegal fishery and prevent the “tendency toward piracy and maritime crime”. The fall of the dictatorship “opened the door to a

⁵⁹ Available at

<http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforlawEnfOfficials-E.pdf>

⁶⁰ Bruce A. Elleman, [et al.], *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 207.

⁶¹ See *supra* note 57.

⁶² Bruce A. Elleman, [et al.], *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 208.

period of instability”⁶³. Aware of this, the UN took measures⁶⁴ to safeguard the ancestral route from Africa into the Gulf of Aden – Red Sea area.

The fall of the Somali central government in 1995 allied to the departure of UN’s forces led to the closure of Somali’s ports to foreign vessels, but on the contrary illegal fishing took place in “the Somali shoreline and sometimes inside the territorial waters and domestic commercial fishing areas”⁶⁵. As traditional fishery is the way of living of coastal villages their subsistence became in risk as a result and a response to the invasion of foreign vessels. Piracy appeared and pirates easily acquired arms as a result of rivalry among clans.

According to the IMB the number of piratical incidents rose from 335 in 2001 to 370 in the following year, providing ways to the eminent risks of attack. In the absence of a central authority, The Republic of Somaliland, in the northern and the Puntland Autonomous Region, cooperated in order to take control over the territorial waters and its resources.

This situation led to the insurgence of forces. As Gary E. Weir observes “some clan warlords controlled the airports, others the maritime facilities and customs revenue and still others focused on the profitable business of selling fishing licenses of dubious legality. Piracy, as an independent and openly illegal enterprise developed slowly, because clan leaders did not wish to have their licencing business interrupted”⁶⁶. But he also points out the region of Mugdug as an uncontrolled one, because the lack of interest by clans and extreme poverty resulted ties with reminiscences of piracy turn it into a more fearful practice –modern piracy-.

Abdullahi Yusuf Ahmed, former president of Somali, is known for his non-cooperation to stop piracy. Under his presidency modern piracy prospered. In the

⁶³ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 209.

⁶⁴ UNOSOM I and II were operations of United Nations. The former monitored the cease fire of Mogadishu and humanitarian assistance. The UNOSOM II reiterated the importance to a secure environment and the measures to achieve it in order to spread and guarantee humanitarian assistance for all Somalia. For further development access at <http://www.un.org/en/peacekeeping/missions/past/unosomi.htm> and <http://www.un.org/en/peacekeeping/missions/past/unosom2.htm>

⁶⁵ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 210.

⁶⁶ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 211.

beginning pirates made use of skiffs⁶⁷ that could keep them at sea for two weeks and two hundred nautical miles away from the shore. Nowadays, the use of “mother ships” allows pirates to be at sea several months with “unlimited” sources from skiffs to weapons. The IMB recommended at first that vessels should keep a distance of fifty nautical miles from the Somali coast and later two hundred nautical miles. However, this advice proved to be inoperative to weaker merchants, who still continued operating at ten knots unsafely, without any proper communication capacity and security force. Another component that led to the flourishing of piracy was that the Combined Task Force 150 was not authorized to patrol and seize in territorial waters of Somalia.

The shipping industry started to enter into contracts with private security companies, and along with the crew there were skilled armed men with military background. Other approach of shipowners has been to employ more crew with the intent to diminish fatigue’s *deficit* and increase security levels. One situation that caught *mass media* attention was the Seabourne Spirit⁶⁸ in 2005 that managed to escape a pirate’s seizure due to efforts of the crew and Gurkhas (private security). After this episode pirates began to use “mother ships” and attack beyond two hundred nautical miles established by IMB.

The escalation of piratical attacks on 22 April 2008 led countries such as France, the United Kingdom and the United States to request a resolution from the United Nations (UN) to stop piracy. Therefore, “UN Security Council adopted Resolution 1816 with the consent of Somali” which gave permission to foreign naval vessels to pursue, seize and by “all necessary means”⁶⁹ suppress piracy in Somali territorial waters for six months. However, this resolution had marginal effects: it diminished piratical incidents but did not affect the roots of piracy, for example the creation of a sustainable economy grounded on fishing which is being attempted through RECOFI’s intervention.

The Somalia situation is fair to say it contemplates:

-Somali piracy enfolds large webs of complexity;

⁶⁷ The use of skiffs is quite suitable because it let pirates to be away of their targets, which they can easily approach between 15 to 30 minutes. Besides its fastness, patrol forces can barely distinguish them of fishermen skiffs.

⁶⁸ Available at <http://news.bbc.co.uk/2/hi/4409662.stm>. Accessed on 12 October 2013.

⁶⁹ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 215.

-Hijacking became one of the most noticeable *modus operandi* in Somali waters and surroundings;

-If the Resolution 1816 authorized the entering of foreign naval forces within the twelve miles; The Resolution 1838, on 7 October 2008, requests the intervention of States with military capacity to suppress piracy on the high seas off Somalia; States under this resolution were authorized to extend their enforcement jurisdiction beyond their territorial boundaries, regardless of such intervention is not sustained by UNCLOS;

-In January 2009, Combined Task Force 150 was created to develop countermeasures;

-Somali drew much attention of the entire world, but especially of the USA, Europe, India, Australia, Japan, Russia, China and Malaysia;

-IMB year by year reports the escalation of piratical incidents with a few oscillations due to international antipiracy measures;

-The lack of resources and a centralised government have been deferring the creation of local forces to suppress piracy; and by this means, Somalia has been assisted by the international community on the ground -destroying pirates' sanctuaries- and on the seas. Nevertheless, merely the destruction or suppression does not solve the core of the problem, but only mitigates it.

-Keith Weinstanly (deputy commander of combined Task Force 150) reports the lack of human and material resources in order to prevent any attack (at any place at any hour). The response he advises is private security. However, this type of response is the responsibility of shipping companies.

1.3.2. Piracy and Maritime Security in the Gulf of Guinea

Consequently, it is important to make a brief introduction of the case of Nigeria. This is simply an attempt to understand how “a blessed country”⁷⁰ turns into a stage of piracy and maritime crime.

⁷⁰ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 193.

The roots of piracy in Nigeria do not differ too much from those discussed in Somalia, although Nigeria presents a range of natural resources that we cannot find in Somalia. However, the Nigerian population has not been benefiting from this richness of Natural resources. Nigeria kept the attention of international community, because Nigeria has been taking their own countermeasures to prevent piracy and maritime crime. The IMB recounted at least forty-two attacks in 2007 having as targets “international shipping and offshore installations”⁷¹. Nigeria is not the only country suffering with this upraise, but also the Gulf of Guinea.

The Gulf of Guinea has its footprint as a fossil fuels supplier, and the more investment that it calls the more maritime security it demands. Those who invest expect the return. Are Nigeria and the other neighbour States fully prepared and equipped to stop piracy?

The conflicts’ complexity of the Niger Delta is a result of: the number of States, the number of local authorities, ethnic groups, a large number of communities with different dialects and the differential treatment given by oil-companies to communities - some are paid for the use of the land and others not-. This differential treatment has been stimulating conflicts and rivalries. It is also important to remember that the higher levels grounds, politicians as well as governments have been benefiting in a large scale, while their populations live below poverty and in deplorable human conditions.

Narrowing the scope, Nigeria is known for having the biggest demographic rates in Africa. One of the major problems is the social stratification inflated by poor governance allied to corruption, pollution and unemployment giving boost to criminality and insurgency. Social instability has not converted into a civil war because of the reminiscences of 1967-1971.

While the social and political environment is unstable and could produce disastrous results, but fortunately or not this environment has supported piracy, which the Nigerian naval forces have to face.

One of the most important concerns is the increase of kidnapping that has become common practice. Pirates have been creating fear among mariners and petroleum workers. In the meantime, fishing industries has also not been kept aside.

⁷¹ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p.191.

Pirate attacks targeted to fishing boats increased up to 107 between 2003 and 2007. Moreover, in January 2008 fifty attacks were reported alongside resulting in the death of ten sailors. So, the growth of attacks is linked to the increase of the rate of violence. Pirates are not the only concern of Nigerian maritime forces, there are also insurgents, criminals and community activists' attacks.

Arild Nodland observes that the attacks along the Niger Delta and Delta State do not follow the same configurations. While in Lagos the attacks are carried out by bandits for their personal gains –some are categorised in piracy, others are classified as robbery at sea. On the other hand, the attacks along the Niger Delta encompass kidnappings in order to obtain ransoms, and have political aims with a high rate of violence. There are relevant differences in the nature of actions of piracy between Lagos region and the Niger Delta. Arild Nodland states that the attacks in the Niger Delta “are also better coordinated and often entail the use of numerous fast attack craft, explosives, and heavy weapons, such as 50 – calibre machine guns and rocket propelled grenades”⁷². Pirates recognise that they can obtain more gain and success in the Niger Delta. Whereas the major number of attacks occurred in this area are those perpetrated by insurgents. The principal target of pirates, insurgents and activists are the international petroleum companies.

About these attacks, Arild Nodland states that “an attacker may one day kidnap an oil worker to buy a nice car, the next day he may join a raid by a militant group and on the third he might hijack an oil rig to generate cash for his tribal chief”⁷³.

The efforts of the Nigerian Navy assisted by Niger Delta Joint Task Force are related to the surveillance, security and dominance of territorial waters. The combination of several measures can offer a credible determination of the Nigerian navy to increase maritime security in the Niger Delta. However, the constant lacks of resources as well as the absence of proper leadership and accurate administration have been some of the reasons for the lack of effective control of the Nigerian Naval forces. Which led us to conclude that Nigeria and the others forces of the Gulf of Guinea are not ready to suppress piracy.

⁷² Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. pp. 196-197.

⁷³ See *supra* note 69.

Arild Nodland recognises that Nigerian reality would not be completed without a reference to the “cake”. The same author quotes Marvis Zones to explain that “cake” is what the governments held in their power, such as: “revenues, jobs, infrastructures projects, access to universities, public-sector employment”⁷⁴. Those resources have been pursued by insurgents, criminals and community activists. However “cake” is what governments have been deviating from their country and sending it to their foreign bank accounts. In the political field, corrupt politicians have been creating alliances with criminal groups in order to terrorise and threaten their opponents, opening a breach in justice. The prevalence of this system “authorizes” criminal groups to act freely, being impunity another factor that has been intensifying the complex reality of Nigeria.

Therefore, corruption, lack of governance, growth of poverty and social gap have been the roots of criminality in the Gulf of Guinea, bringing maritime insecurity to the headlines of the international community.

⁷⁴ Bruce A. Elleman, [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010. p. 204.

2

Challenges of Piracy

In this chapter we will focus on an evolutionary view of piracy its obstacles and limitations. Firstly, we will look into a justifiable prohibition on piracy, followed by a dynamic where human rights either dictate a solution or are an obstacle to the suppression of piracy. Also, chosen forums will be contemplated questioning its reliance as a direct response to the impunity gap that international community assisted disinterestedly.

Apart from the legal challenges and limitations attached, human, social, economic, commercial and environmental impacts also bring concerns to the prevention and combat of piracy. If in ancient time's war against piracy dictated the banishment of the latter one, currently "war" must be supported attending to its several ramifications.

2.1. Why is piracy condemned?

Hugo Grotius in *The Freedom of the Seas* determined the principles of freedom of the seas –dictating that seas do not belong to any nation-. Currently, it is commonly recognised as a customary rule codified in UNCLOS in its article 87(1) "The high seas are open to all States, whether coastal or land-locked. (...)" comprising freedom of navigation on high seas. Relying on the Law of the Nations, Grotius states "Every nation is free to travel to every other nation and to trade with it"⁷⁵, in order to suppress the needs of each nation and to create bounds of fellowship. Conversely, piracy and robbery resulted in a rejection of this principle, thus selfishness was one of the roots of wrongdoings at the sea, and it remains as such.

Because the principle of the freedom of the seas was in risk, and more importantly safety navigation, nations started to limit this freedom extending their jurisdiction over the sea. Grotius embraces this thought but with a limitation, "the sea appears capable of being made a property by the power possessed of the shore on both sides of it; although beyond those limits it may spread to wide extent, which is the case with a bay, and with a straight beyond each of its outlets into the main sea or ocean. But

⁷⁵ Hugo Grotius. *The Freedom of the Seas*. Edited by James Brown Scott. Translated by Ralph Van Deman Magoffin. New York: Oxford University Press, 1916. p.7.

this right of property can never take place where the sea is of such a magnitude as to surpass all comparison with that portion of the land which it washes”⁷⁶. In the contemporary epoch, the first nation to attempt this was United States of America extending its territory up to three miles, being followed by other nations.

Guilfoyle mentions that piracy compromises high-seas’ freedom of navigation, which is a common interest of all States. Notwithstanding, he also justifies the prohibition of piracy on the grounds that pirates are enemies of all mankind, pointing out that this is more a label than a substantive element. If this “rhetorical phrase” echoed a substantive element, the law of piracy would be always applicable wherever perpetrated (high seas or territorial waters)⁷⁷. Obokata also follows this line stating that piracy is seen as *hostis humani generis*, but does not achieve the level of *delicta juris gentium*. In other words, although not recognised as one of the most heinous international crimes it is a crime over which international courts have no jurisdiction, as Cryer [*et al*]⁷⁸ observed. The last two authors came to the same conclusion. States look upon piracy as a crime to be suppressed under domestic jurisdiction rather than based on international grounds⁷⁹. Thus, States have celebrated treaties, still this does not obliterate the duty of States to criminalise such conduct in their domestic system. Additionally, it demands the intersection of human rights.

Piracy was labelled by Kontorovich as an epidemic⁸⁰. This classification not only concerns its growth and proliferation, but also the dimensions affected. Recently, the human aspect has been the token of the epidemic, though commercial and economic dimensions were the first two to be pointed out. If in the beginning kidnappings-ransoms were one of the touchstones of maritime piracy, now murders of sailors, and the impact on their families and tourists became a delicate issue.

Thus, questions arise:

What is the human cost of piracy?

What are the collateral effects of counter-piracy operations?

Since 2011 a joint effort has been made by the Oceans Beyond Piracy project sponsored by One Earth Future Foundation, IMB and MPHRP in order to cross

⁷⁶ Hugo Grotius. *On the Law of War and Peace*. Translated by A.M. A.C. Campeell. Ontario, Canada: Batoche Books, 2001. p. 89.

⁷⁷ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. pp. 28-29.

⁷⁸ See *supra* note 28.

⁷⁹ See *supra* note 23.

⁸⁰ Eugene Kontorovich. ““A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists.” *California Law Review* vol. 98, no. 1 (February 2010): p.243.

information to produce an annual report that may present the reality of human cost –The Human Cost of Maritime Piracy. The most vulnerable targets of piracy are the seafarers and, as a second degree of victims are their families.

The above report takes into consideration the attacks that occurred in Somalia and in the Gulf of Guinea. As for Somalia⁸¹ the report revealed a number of 589 seafarers' hostages (340 from 2012 plus 240 from 2010 and 2011) the average period of captivity was 11 months. One of the biggest concerns is the period of captivity correlated with the conditions that hostages are kept in. The pirates use both types of violence over the hostages: physical and psychological. The former involves slaps, stabs, wound shots, isolation, deprivation, which involves leaving hostages in the deck during sun hours, forcing them to kneel on deck plates which cause second degree burns or throwing hostages overboard. Most of these abuses occur because seafarers cannot cope with pirates' demands on technical issues related to ships. This last circumstance reveals signs of slavery. Psychological abuses take seafarers into an inhuman level, but the harassment also extends to their families, for instance: "allowing the seafarers to speak to their families, then taunting them, abusing them and firing shots into the air while their families were on the line."⁸² Deaths are also acknowledged as a consequence of hostages being used as human shields or a prolonged inhuman treatment that the hostages meet.

On the contrary, the number of reported attacks in the Gulf of Guinea⁸³ surpassed the reported ones in Somalia. The number of hostages did not reach than those in Somalia, it remained to 206 with an average captivity period of 4 days. Pirates from West Africa do not see ransoms as a primary source of profit, their first focus are the stolen objects easily convertible in cash. However, the degree of violence used by pirates from Niger Delta is higher than the violence used by pirates from Somali, since they are more acquainted with the use of weapons and higher levels of sophistication. In addition, the intensity of violence also depends on the type of piracy. There are four types of approaches made by pirates in these waters, which are: a) tanker hijacking, b) kidnap and ransom, c) armed attacks not for hijack, and d) subsistence piracy. Extreme

⁸¹ Kaija Hurlburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foundation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foundation, 2013. pp. 3-11. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

⁸² *Ibid.*, p.7.

⁸³ *Ibid.*, pp. 12-17.

violence has been identified in attacks not for hijack(c) where the pure intent is to steal cash and/or objects easily convertible into cash. The use of weapons also upraise the levels of violence and risk, being this conjuncture noticeable in the former type, as well as those intended to steal the cargo –tanker hijack-. Surrounded by this terror environment seafarers commonly present levels of stress and anxiety, and moreover a constant feeling of fear of being boarded by pirates. Wound shots, threats with weapons and physical violence are the commonly offences reported in these waters.

So, inviolability of the principle of freedom of seas is no longer the major concern, but rather the life, safety and dignity of seafarers and their families. Not only does piracy have roots in the lack of human dignity, but also itself enlarges this lack of care for humanity. Then, the prohibition on piracy cannot rely only on freedom of navigation or its impact on maritime trade, but also and more importantly in the vulnerability of vessels, its crew and passengers.

2.2. Limitations implied by UNCLOS' definition

UNCLOS presents several limitations. Firstly, piratical attacks cannot be connoted to political aims, but only to private ends, unless political motivation is seen as exclusion. It is generally acceptable that the purpose must be personal gain, unless the action cannot be subsumed into piracy. Guilfoyle states “[t]he test of piracy lies not in the pirate’s subjective motivation, but in the lack of public sanction for his or her acts”, being public acts “tested (...) by reference to state action or authority.” This means that the actions of pirates are not under the authority of any sovereignty. In order to emphasise the relevance of objective elements over drowning the subjectivism, Guilfoyle intertwines his argumentation not only appealing into insurgents’ status but also terrorist acts. He resorts to the insurgent’s status to distinguish them from pirates, and likewise relies on the limits of insurgents: insurgents on the high seas can only attack vessels of the government they are struggling with, so that the exemption could subsist merely contemplating the “the class of vessels attacked”⁸⁴ (aiming to deviate the exclusion from the subjective intent). By the same token, he also states that what gives right to prosecute pirates is not their intent in obtaining personal gain, but the approach they take: pirates act “outside the law of a state-based system” and perpetrate violent

⁸⁴ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. p.33.

attacks against States⁸⁵. The author reasons for acts of terrorism there is no excuse in relying on political intents or other excuses. By the end, Guilfoyle also remarks: “a violent act’s political motivation should not be seen as relevant to its characterisation as an ordinary crime. The words for ‘private ends’ simply emphasise that the violence involved lacks state action or authority’ which can “be tested objectively”⁸⁶. On the other hand, mutiny, which endorses political motives, does not fall under piracy, but it remains an unlawful act to be suppressed under the SUA Convention.

In terms of geopolitical strategy no longer a nation encompasses the jurisdictional power of the older British Empire, thus geographical limits come to the forefront.⁸⁷ Crimes subject to the principle of universality are usually not limited, however piracy is a case apart. After all, States beyond their boundaries can make use of universal jurisdiction if the piratical attack occurs on the high seas or outside of any States’ jurisdiction⁸⁸. If the attack is perpetrated on territorial waters it does not fall under universal jurisdiction, but in the scope of domestic systems.

Thus, two questions arise: until what extent can piracy be repressed? Are States authorised to enforce its jurisdiction to suppress piracy on EEZ and contiguous zone?

As we have seen above (chapter 1.2.1) in the article 58(2) the regime of high seas applies to EEZ “in so far they are not incompatible...” Guilfoyle quotes UNCLOS’ commentaries where the observance of a “unified character of the oceans” was a primary aim. Whereupon, he states that no haziness of article 86 of UNCLOS should prevail in the enforcement of criminal law in the EEZ and contiguous zone.⁸⁹ In addition, we must take into account the ‘reverse hot pursuit’⁹⁰, for example: commonly if a pirate vessel after of perpetrating an act of piracy escapes into territorial waters the coastal state has jurisdiction to trial. Despite of this reality, the pursuing ship may continue pursuing if the coastal state consents its entrance in territorial waters, in order to carry on the pursuit.⁹¹ One remark must be done ‘reverse hot pursuit’ is not

⁸⁵ Douglas Guilfoyle. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009. p.37.

⁸⁶ *Ibid.*, p. 42.

⁸⁷ *Ibid.*, pp. 42-45.

⁸⁸ *Ibid.*

⁸⁹ See *supra* note 84.

⁹⁰ Conversely the right to hot pursuit is provided by UNCLOS in article 111. The hot pursuit must start in internal waters, territorial water or contiguous zone towards the high seas.

⁹¹ PILPG. “Applicability of Combatant Status to Pirates.” Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. p.3. Available at http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.

contemplated by UNCLOS, but given the geographical limitations of UNCLOS and the conjuncture of Somalia the UN Security Council Resolution 1816 (2008)⁹² in its seventh paragraph consented the right of ‘reverse hot pursuit’ for a period of six months. The following resolutions renewed the consent to entering in Somali territorial waters in order to pursue pirates’ ships and additionally allowed land-based operations.

Being the scope of flag state jurisdiction constrained by piracy and slave trafficking [article 92(1) of UNCLOS], States have the right to board other vessels if “there is reasonable” suspicions of piracy or other offences [110(1/a) UNCLOS].

Moreover, under UNCLOS States shall co-operate to prosecute pirates on the high seas, outside areas of States’ jurisdiction and EEZ, beyond these geographical areas the States’ obligation ceases on the grounds of universal jurisdiction, articles 100 and 105 of –UNCLOS. Besides, Obokata emphasises that the expression “may” in article 105 weaken the obligation, and additionally adds that “reasonable ground for suspecting” implies a right and not an obligation in article 110⁹³, which is classified as co-operative limited universality principle⁹⁴.

As mentioned above (*supra* 1.2.), the given jurisdiction bases itself on the nature of the offence’s gravity chalking widely cooperation. Looking at article 105 there is also no obligation for the seizing state to punish pirates. This article neither obliterates the extradition of suspects nor mandates their transference to States which have jurisdiction, but such can be sustained in the terms of the extended cooperation of article 100 of the same law⁹⁵. However, with extradition human rights concerns arise. How and by whom pirates are prosecuted is left to the criteria of domestic systems. The reasons come from the silence of UNCLOS, from the procedural constraints and the lack of resources to lead in front an entire trial and its imprisonment. Additionally, political motivations have been used as an excuse not to prosecute pirates; for instance: the United Kingdom asylum laws entitle the offender to remain in the country *ad infinitum*;

⁹² Available at http://www.marad.dot.gov/documents/UNSCR_1816-_SIT_IN_SOMALIA.pdf

⁹³ Tom Obokata. “Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression.” *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). p.21.

⁹⁴ Maria Gavouneli. *Functional Jurisdiction in the Law of the Sea*. Edited by Vaughan Lowe. Vol. V. 62. Leiden: Martinus Nijhoff Publishers, 2007. p. 20.

⁹⁵ J. Ashley Roach. “Countering Piracy off Somalia: International Law and International Institutions.” *American Journal of International Law* vol. 104, no. n. 3 (July 2010): pp. 402-409.

while Portugal requires a connection: territorial and nationality (active personality principle or passive)⁹⁶.

As Chang noticed, side by side with other scholars, “UNCLOS only defines the circumstances under which universal jurisdiction applies but does not set a universal penalty or empower a single tribunal to hear the charge of piracy.”⁹⁷ Thus, what we here have is a problem of enforcement of the law, which opens a discussion towards universality that we will later develop and discuss in chapter 3.

2.3. International Human Rights a useful instrument or an obstacle?

Once we appeal to human dignity and compliance with human rights, we ought to have in consideration dual approach on this matter. We cannot claim for the respect of the human rights from only one of the parties, we have to see that it is respected also by the offenders. Justice cannot rely on Talion law. Otherwise it is never going to be fulfilled. Therefore, human rights ought to take part not only in the suppression of piracy, but even its roots.

Victim's Rights & Criminal Proceedings

Obokata justifies the prohibition on piracy by using international human rights as a powerful instrument to control and subdue piracy. This is far more complex as it defends essentially the rights of victims as well as of the defendants alike. Obokata criticises the fact that victims were set aside by the UNCLOS and the SUA Conventions⁹⁸, defending that such reality is unbelievable taking into account the level of inhumanity that the victims' suffer. Therefore, the author defends a balanced and dual approach, where the victims' and defendants' rights should be regarded equally. Nevertheless, the absence of victims' status on the quoted international instruments of the States forces to unit their efforts to fill this gap. Thus, the dignity of victims will be restored by bringing pirates to justice and through a program protection. Nevertheless, the pirates' human rights also cannot be disregarded nor ignored at any level.

⁹⁶ Diana Chang. “Piracy Laws and the Effective Prosecution of Pirates.” *Boston College International and Comparative Law Review* vol. 33, issue 2 (January 2010): pp. 278-284. Available at <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3>.

⁹⁷ *Ibid*, p. 283.

⁹⁸ Tom Obokata. “Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression.” *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). p. 22.

What rights are violated and what kind of mistreatment is inflicted over the victims? The range of rights affected oscillates from civil to political, economic and social. Why? Because the interdependency and indivisible nature of human rights means that there are rights that can only be considered fulfilled when other rights are equally taken into account⁹⁹. When a victim is taken hostage, his right of freedom is subdued, followed by inhuman treatment that he is meted out, which may culminate in fatality and the consequent violation of the right to life. While hostages are in captivity the economic substance of their families is put at risk. As we have seen, in the case of Somalia hostages, they are kept as hostages for eleven months which results in a steep degradation of their families' socio-economic status.

Invoked civil and political rights	Protected economic, social, cultural rights
Right to life	Rights to health, food, water, education
Freedom from torture/degrading treatment	Rights to health, housing
Right to private/family life and home	Rights to health, housing
Right to property	Right to social security, housing; collective right to ancestral land of indigenous people
Protection of the child	Rights to health, food, education
Freedom of movement, residence	Right to housing; collective right to ancestral land of indigenous people
Freedom of association	Right to form and join trade unions, rights to collective bargaining
Freedom from forced/compulsory labour	Right to work/to fair conditions of work

Table 1: Intersection of Rights¹⁰⁰

Regarding this last statement and what has been discussed earlier in chapter 2.1, due to the severity of injuries that were inflicted for which the human rights groups demanded the interventions of the States, Justice can be effectively achieved if we consider piracy, armed robbery and others acts that threat maritime safety as breaches of human rights than simple classification of the threats¹⁰¹. Besides, international human rights offer a broader range of applicability. Additionally, the classification and the distinction of the criminal acts go to a second plan. Moreover, under this branch States

⁹⁹ Theo van Boven. "Categories of rights." In *International Human Rights Law*, edited by Daniel Moeckli [et al.]. Oxford: Oxford University Press, 2010. pp. 178-183.

¹⁰⁰ In Theo van Boven. "Categories of rights." In *International Human Rights Law*, edited by Daniel Moeckli [et al.]. Oxford: Oxford University Press, 2010. p. 179.

¹⁰¹ Tom Obokata. "Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression." *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). p. 24.

are obliged to enable solutions to restore victims' dignity, such as it is stipulated in International Convention on Civil and Political Rights (ICCPR) article 2(3), and reiterated in regional instruments: European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR). Even further, States are obliged to enact laws in order to bring pirates to justice. Meanwhile, a program of victims' protection must be developed in order to provide medical assistance as well as legal support during the criminal proceedings. Additionally, a compensation as much as it is possible in order to recover the victims' families' economical standard be taken we should take into consideration.¹⁰²

On the other hand, human rights demand also a number of obligations on States in order to prosecute the suspects through detentions until the trial, without disregarding their personal rights. In general, this implies that the criminal charges must take into account the right to life, the human treatment and free from torture. Once detained the suspect "shall be brought promptly before a judge or other officer authorized by law", article 9(3) ICCPR, the minimum of this right is fulfilled with access to a consular authority article 36 of the Vienna Convention on Consular Relations (VCCR). Alongside, articles 9(3) ICCPR and 5(3) ECHR have been dealing with the issue of suspects being held for days and, in some cases, the period of detention completes a month. The right to liberty of suspects is being undermined because of the schedule of the voyage¹⁰³. This constraint regularly occurs when suspects are detained on high seas. In order to tackle this fact detainer States had to enter into agreements with third States to assure that suspects are promptly brought before a legal authority –regional response to prosecute pirates. Additionally, De Bont makes reference to the automaticity of due process rights under SUA Convention¹⁰⁴, which does not happen under UNCLOS.

Furthermore, a fair trial is another issue to be considered. Article 14 in ICCPR engages two components: one over the jurisdiction, which regulates that the court must be impartial, independent and established by law; and another over the accused, which shall not be discriminated, and the principle of equality of arms is demanded in reference to the opponent. A trial to be fair must guarantee at least a minimum of

¹⁰²Tom Obokata. "Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression." *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). p.23-26.

¹⁰³Saoirse De Bont. "Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective." *One Earth Future Foundation*. September 2010. pp. 21-22. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹⁰⁴*Ibid.*, p.23.

requirements with regard to the defendant which have been established in paragraphs 2 to 7 of article 14 (presumption of innocence, freedom of self-incrimination, right to be informed of the charge, right to an adequate defence and right to review)¹⁰⁵.

Another concern is the possibility of the suspects claim for asylum. Once under the jurisdiction of the state-prosecutor, pirates may claim this right. Any attempt to take the suspect out of the country compromises the respect for human rights. The United Kingdom, distressed with claims in result of violation of human rights, barred the detention of suspected pirates by the Royal Navy¹⁰⁶. Also, the principle of *non-refoulement* shall be respected. If there are suspicions that detainees may face inhuman treatment or torture¹⁰⁷ repatriation as well as transference of detained pirates to a third State for trial is prohibited.¹⁰⁸ The scope of article 33 of the 1951 UNHCR was intended to embrace both cases¹⁰⁹. The principle of *non-refoulement* was later reiterated in article 3 of UNCAT and article 7 of ICCPR and attending to its historical background the principle “crystallized into a rule of customary of international law”¹¹⁰. Even so, the derogability on international zones is questionable. This last statement does not go further once States ought to respect human rights in its territory and persons under its jurisdiction.

A paradigmatic case has been the Kenyan (which endorses anti-piracy measures) with which States established and entered into agreements that ensured the respect for the rights of defendants. One of the agreements was between Kenya and the European Union. In this case, Kenya guaranteed the full respect for the rights of defendants, and

¹⁰⁵ Tom Obokata. “Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression.” *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013). pp. 25-27.

¹⁰⁶ Saoirse De Bont. “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. p. 24.. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹⁰⁷ See *supra* note 102. And Saoirse De Bont. “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. pp. 25-26. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹⁰⁸ International cooperation was required to trial pirates by the resolution 1851 of 16 December 2008. In 2009 a Memorandum of Understanding was signed between the United States and United Kingdom with Kenya establishing that pirates seized by the vessels of the former states would be prosecuted by Kenyan Courts. Followed by the European Union and Denmark. See *supra* note 93. And James Thuo Gathii. “Kenya's Piracy Prosecutions.” *The American Journal of International Law* vol.104, no. 3 (July 2010): pp. 416-417. Besides Kenya, western countries also entered into agreements with Seychelles and there are also reports of suspects being transferred to Somalia, Puntland and Yemen. in Saoirse De Bont. “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. p. 28. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹⁰⁹ Guy S. Goodwin-Gill and Jane McAdam. *The Refugee in International Law*. 3rd. Oxford: Oxford University Press, 2007. p.204.

¹¹⁰ *Ibid.*, p.248.

the other party through the EU-UNODC counter-piracy program¹¹¹ agrees to fund the Kenyan system of imprisonments and trial expenses in order to support the witness program¹¹². The main issue is that diplomatic agreements do not guarantee the full respect for human rights. These agreements ought to rely on: “establish and implement clear procedures for obtaining such assurances; arrange adequate judicial mechanisms for review; and ensure effective post-return monitoring arrangements”¹¹³. Even so, the weakness of this instrument has not been an obstacle for the transference of suspects to countries where the infringement of human rights is up to date.

In so doing, Kenya was designated by the Committee against Torture as a perpetrator of torture and degrading treatment inflicted upon the suspects¹¹⁴. The main reports regard the absence or denial to the right to access a lawyer and the detainees are not allowed to contact their families¹¹⁵, also when convicted the living conditions of prisoners are deplorable: “torture, degrading and inhuman treatment, unsanitary conditions and extreme overcrowding as endemic”¹¹⁶. Nonetheless, other cases come to light where the living conditions of prisoners in Yemen are so shameful and the disrespect for human life could culminate in the crucifixion of pirates.¹¹⁷

Finally, Obokata does not disregard the consequence of others crimes to be perceived on the same grounds. Still, the rights that are disregarded by the pirates require a higher protection. Plus the conduct *per se* encompasses a role of acts that aggravate the crime and sophistication provides its effectiveness. As mentioned above, despite the decrease in numbers of piratical attacks, pirates have been accomplishing

¹¹¹ Since 2009 this program has been implemented in cooperation with UNODC and EU. Their main goal is to support the criminal justice in the Horn of Africa and the Indian Ocean. Such program aims to give direct response to the impunity of pirates and also respect, protect and fulfil human rights.

¹¹² Kenya recently warned western countries if they do not fulfil their obligations its regional cooperation would cease. in Emmanuel Kisiangani, “Somali pirates: villains or victims? *South African Journal International Affairs* Vol.17, no. 3 (December 2010): p. 368.

¹¹³ Saoirse De Bont, “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. p.29. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹¹⁴ James Thuo Gathii, “Kenya's Piracy Prosecutions.” *The American Journal of International Law* vol.104, no. 3 (July 2010): pp. 430-434. And Saoirse De Bont, “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective.” *One Earth Future Foundation*. September 2010. pp. 27-28. Available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

¹¹⁵ See *supra* note 111.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

better results in attacks at first shot. This conjuncture allows the condemnation of piracy as a violation of international human rights¹¹⁸.

On the other hand, Kontorovich admits that the intersection of human rights may hinder the effective suppression of piracy. Pirates' legal status is not clarified, so it is commonly accepted that they fall "in the grey zone between military combatants and civilians"¹¹⁹. This ambiguity is also notorious when counterattack measures ought to be taken, since they must be in accordance to legal grounds. Kontorovich corroborates his argumentation bringing into light issues such as: the "potential confusion about pirates' prisoner of war (POW) status, the use of prolonged detention, rendition of suspects to countries with poor human rights records, claims of abuse by detainees, the difficulty of proving in civilian courts cases arising from active military operations, and the legality of 'targeted killings' of suspected hostile civilians."¹²⁰ Attending into the several branches of international law he states "the growth of international legal norms that limit state authority and provide greater protections for individuals make it harder for nations to perform the oldest and perhaps most basic law enforcement function in international law: preventing piracy."¹²¹

If UNCLOS obliges States to suppress piracy, there are other instruments that obstacles to that goal, once international rules have been dictating a higher protection to individuals. As seen in part 1.2.2, the classic countermeasure of killing pirates violates international human rights and humanitarian law. Another argument rests on the insufficiency of a "purely criminal approach"¹²² turning a military response an acceptable approach by the Resolution 1851. The same Resolution adverts that this response must respect international order. Kontorovich refers that the UN Security "opened the door" for the classic countermeasure.¹²³ However, States have been refraining from such action, since they can be accused of violating international humanitarian law. If they pursue with this countermeasure States would be responsible for killing civilians. Besides this, it is important to remember that on differentiating pirates from fishermen, it is a difficult task.

¹¹⁸ See *supra* note 102.

¹¹⁹ Eugene Kontorovich. "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists." *California Law Review* vol. 98, no. 1 (February 2010): p. 245.

¹²⁰ *Ibid.*

¹²¹ Eugene Kontorovich. "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists." *California Law Review* vol. 98, no. 1 (February 2010): p. 246.

¹²² *Ibid.*, p. 258.

¹²³ *Ibid.*

Another constraint is set by the Third Geneva Convention Relative to the Treatment of Prisoners of War. Since pirates are in a grey zone, when detained they may enjoy POW status. Article 5 of the quoted convention applies in case of ambiguity. As Kontorovich denotes “POW status would not prevent pirates from being prosecuted...”, however “the added judicial procedures would increase the uncertainty and the cost is high in apprehending pirates.”¹²⁴

When Kontorovich considers pirates as defendants his approach is harsher than Obokata’s. Firstly, there is a difficulty to determine who is a pirate and the means to prove it, since pirates as well as seafarers may carry weapons in their boats. Besides, once detained the identification of individuals is also an obstacle, because many of them do not possess documents that prove their identity and nationality. The lack of papers may lead to the detention of innocent civilians¹²⁵.

Geographic matters also bring constraints to prosecution, because it affects the rights of the defendant, which cannot be complied as those of “ordinary defendants”, as Obokata identified. One of the obstacles comes from counsel and translation services for defendants and victims, since we may be considering a multitude of nationalities and idioms and/or dialects.¹²⁶

Inhuman treatment on Kenya prisons is also reported by Kontorovich, but he adds that religious concerns had come into the light. Currently, the human rights of Muslims are in the spotlight as a result of the War on Terror, and there are concerns about the Guantanamo scenery being repeated in Kenya. Besides, religious rights to the detainees were denied by the captors States captors as has been alleged in the Kenya domestic courts.¹²⁷

Based on the right of asylum Kontorovich describes the reality as follows: “Other human rights rules of Western countries increase the cost of arresting pirates to the apprehending nation, while decreasing the cost to the pirates themselves.”¹²⁸ In the end, it is the pirates who benefit of such circumstances rather than the capturing nation.

¹²⁴ Eugene Kontorovich. ““A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists.” *California Law Review* vol. 98, no. 1 (February 2010):p. 262.

¹²⁵ *Ibid.*, pp.263-264.

¹²⁶ *Ibid.*, p. 265.

¹²⁷ *Ibid.*, p. 266.

¹²⁸ *Ibid.*, p. 267.

The implications of the *non-refoulement* principle are also regarded. Western countries have always excluded Somalia for the prosecution of Somali pirates due to a virtual judicial system, the certainty that detainees would suffer inhuman treatment and the death penalty in case of a trial resulting in a conviction. In order to respect international human rights and international refugee law Somali pirates had to be transferred to third States, such as Kenya, Yemen and Seychelles. The concerns of regional solution are the same as Obokata's.

The relevance of International Human Rights in uprooting Piracy

The roots of piracy are another touchstone of human rights. Poverty, unlawful governments and “socio-political instability” have been identified by several scholars as the roots of piracy¹²⁹. Having been already acknowledged by ancients and recognised century by century their mitigation has been seen with indifference, which remains until the present day. At first, a sense of meaninglessness embodied States, but their compliance with the above subjects took place when they saw their interests being compromised. UN took the lead and, in consonance with the Millennium Campaign there were eight objectives to be responded; they were: end famine, establish universal education, promote gender equality, promote child health, promote maternal health, combat the spread of HIV/AIDS, promote environmental sustainability and create a global partnership¹³⁰.

Mejia Jr. [*et al.*] developed a study where they trace the connections between the roots mentioned above and piracy in 152 countries (where piratical incidents might occur). In order to do so, they took into account variables such as: Generalized Pareto Distribution (GPD) per capita; civil and political rights and freedom status engaging the indicators from the Freedom House organization¹³¹.

They concluded that in countries where there is a high GPD, piratical attacks do not occur, in contrast in countries where income decreases, the number of piratical incidents rises. In the same way, where political and civil rights are diminished, the number of attacks is increased. Also, the intersection and escalation of variables led to a decline of piratical incidents or its extinguishment. Although, Mejia Jr. [*et al.*] identify

¹²⁹ Maximo Q. Mejia JR, Pierre Cariou and François-Charles Wolff. “Piracy in Shipping.” In *The Blackwell Companion to Maritime Economics*, by Wayne K. Talley, West Sussex: Wiley-Blackwell, 2012. pp. 360-361.

¹³⁰ For further developments see <http://www.millenniumcampaign.org/about/> accessed on 1 December 2013.

¹³¹ Maximo Q. Mejia JR, Pierre Cariou and François-Charles Wolff. “Piracy in Shipping.” In *The Blackwell Companion to Maritime Economics*, by Wayne K. Talley, West Sussex: Wiley-Blackwell, 2012. p. 363.

Somalia as “a clear case of a country in which economic development, political and civil rights and freedom status stagnated from 1996 to 2008, while acts of piracy have skyrocketed in the last few years”¹³² the data is not clear. In others words, there are variables which make the number of piratical attacks oscillate. Pavlov, through the System Dynamics, draws the entire Somali environment, which we will develop in the third chapter.

States have an obligation to secure human rights and its respect. If not contemplated, the living conditions of society are undermined by poverty, famine, unemployment and ruled by social instability. Besides the absence of a central government or its weakness to respect, protect and fulfil human rights leads to anomie. A region where this conjuncture is noticeable creates a “subculture willing to support individual criminal behaviour, operating in an environment to stop it.”¹³³ So, anomie is the absence of a moral and social conduct that produces “deviant behaviour and ultimately social upheaval.”¹³⁴ Those deviate behaviours are associated to the raise in criminality. Shane and Lieberman explain piracy through the “Opportunity Theory” which embraces three perspectives: the routine activities approach, the rational choice perspective and the crime pattern theory.

Routine activities approach indicates that a crime is close to be perpetrated when three conditions are fulfilled:

- 1) “the presence of a motivated offender”: piracy results from the lack of human dignity;
- 2) “the presence of a suitable target”: pirates chose their targets in accordance to the aim they are after. ‘Suitable targets’ comprehends the following qualities: value, inertia, visibility and access. Which remind us of the nature of attacks in Nigeria. Pirates who perpetrate ‘armed attacks not for hijack’ and ‘subsistence piracy’ are after cash or objects easily convertible into cash (value). Inertia and visibility recall ‘taker hijack, where the weight vessels can be spot from the shore line or mother ships.

¹³² Maximo Q. Mejia JR, Pierre Cariou and François-Charles Wolff. “Piracy in Shipping.” In *The Blackwell Companion to Maritime Economics*, by Wayne K. Talley, West Sussex: Wiley-Blackwell, 2012. p. 364.

¹³³ Jon M. Shane and Charles A. Lieberman “Criminological Theories and the Problems of Modern Piracy.” In *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century*, by M. R. Haberfeld and Agostino von Hassel. Dubuque, LA: Kendall Hunt Publishing Company, 2009. p. 8. Available at http://jonmshane.com/Maritime_piracy.pdf.

¹³⁴ *Ibid.*

Access lead us the approach to board vessels by the use of weapons and devices¹³⁵;

- 3) “the absence of a capable guardian”: there is no authority to prevent and repress deviate behaviours.¹³⁶

The rational choice perspective is associated to the balance made by the offender in order to pursue or not with the wrong. Pirates present higher predisposition to perpetrate the wrong rather than avoid it. Once the living conditions of pirates and the pleasure and benefits obtained through attacks overpasses the fear of being detained and eventually punished¹³⁷.

Crime pattern theory, advocates that the environment may condition the means to commit the crime. If in the beginning piracy had a “raw” approach, now due to its perpetuity and surrounding environment –corruption, instability- it opens the door to its sophistication.¹³⁸ The sophistication of technic and the rate of success of attacks imply that pirates have been having access to legal information and technological knowledge to circumvent the law.

In conclusion, the “Opportunity Theory” helps us understand and identify patterns so that strategies could be drawn to reduce the opportunity.

Therefore, more than ever the challenge is on human rights. As aforementioned human rights are only achieved as a whole if all the nuances are also completely considered. Social and economic rights when disregarded undermine civil and political rights. On the contrary, when civil and political rights are not respected adequately it does not hinder the development of social and economic rights, but it prevents their higher efficiency. Good governance is also connected to the observance and development of human rights. Therefore, States have the obligations to respect, protect and fulfil human rights, and in case of violation remedies must be also considered.

¹³⁵ Jon M. Shane and Charles A. Lieberman “Criminological Theories and the Problems of Modern Piracy.” In *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century*, by M. R. Haberfeld and Agostino von Hassel. Dubuque, LA: Kendall Hunt Publishing Company, 2009. p. 10. Available at http://jonmshane.com/Maritime_piracy.pdf. And Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foudation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foudation, 2013. p. 9. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹³⁶ See *supra* note 132.

¹³⁷ Jon M. Shane and Charles A. Lieberman “Criminological Theories and the Problems of Modern Piracy.” In *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century*, by M. R. Haberfeld and Agostino von Hassel. Dubuque, LA: Kendall Hunt Publishing Company, 2009. pp. 11-12. Available at http://jonmshane.com/Maritime_piracy.pdf.

¹³⁸ *Ibid.*, p. 11.

Nevertheless these obligations cannot be regarded in a narrow perspective –within States’ territories-, but ought to be transplanted towards international community. So, States are obliged to enact good governance within their boundaries towards individuals under its jurisdiction, and outside frontiers States are bound after other States to assist vulnerable individuals exposed to the most degrading ways of living.

2.4. Brief analysis on study cases

The roots of piracy were previously identified *supra* in chapter 1; however, we have not disclosed those roots in detail. At this point, our intention is to ascertain the roots of piracy, the evolutionary scenery, and the impact of piracy and additionally the effects of counter-piracy operations.

2.4.1. The Aden’s Gulf: the core of oil intersection

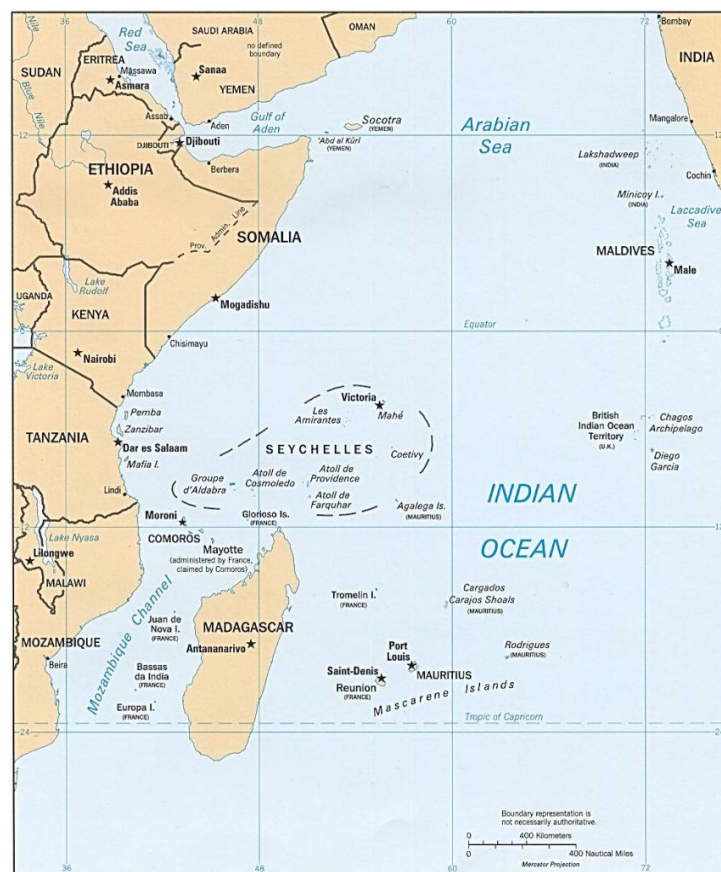


Figure 1: Piracy in the Indian Ocean¹³⁹

¹³⁹ Ghassan Schbley and William Rosenau. *Piracy, Illegal Fishing, and Maritime Insecurity in Somalia, Kenya, and Tanzania*. CNA Information Memorandum, Strategic Studies, CNA, November 2013. p. iii. <http://www.cna.org/sites/default/files/research/IIM-2013-U-005731-Final3.pdf>.

One of the roots mentioned by scholars has been the geographical location. As we can perceive in Figure 1 there is a close proximity of waters. In the beginning the core of piracy took place “around the port of the Mogadishu to areas outside the Somali waters, extending into the Gulf of Aden and downwards towards the exclusive economic zone of the Seychelles”¹⁴⁰. The Gulf of Aden is known as one of the busiest lanes of maritime transportation, being the major route for crude oil. The market has been severely affected by piracy resulting in the fluctuation of oil prices. Besides this, the entire piratical organisation depended on land infrastructures. The acceptability of coastal villagers had been for long the basic settlement of pirates, providing them outlaw ports and dens to keep hostages for undetermined periods of time. As a payment for this land sanctuary an amount of the ransom is distributed among impoverish Somalis. This acceptability has yet an additional reason: “Somalis’ perception that foreign countries are profiting from their country’s ‘misery’ has served to increase the popularity of pirates, as ransom payments are viewed by Somalis ashore as legitimate taxation”¹⁴¹.

The absence of a central government is no longer the flaw on the system, but rather its weakness, which has been diminishing the possibilities to overpass the stateless stage. Its *de non facto* control over all territory resides on the ethnographic and religious multiplicity and its historical background although it elucidates how Somalis had always been against a central government. Lewis incarnates the spirit of Somaliland people as follows: “Somalis have an unusually wide-ranging tolerance of the absence of centralized government. From a traditional perspective indeed, they could be said to need States less than need them!”¹⁴² Allied to the environment we have corruption, not from the central government, but from the decentralized authorities, notwithstanding the efforts of international community, *inter alias*, the United States and the European Union, to redeem Somalia’s complexity from “war profiteers” that take economic advantage of the instability and impoverishment of Somalis¹⁴³.

¹⁴⁰ Emmanuel Kisiangani. “Somali pirates: villains or victims ? *South African Journal International Affairs* Vol.17, no. 3 (December 2010): p. 362.

¹⁴¹ *Ibid.*, p. 363.

¹⁴² I.M. Lewis. *Making and Breaking States in Africa: The Somali Experience*. Trenton, NJ: Red Sea, 2010. p. xx

¹⁴³ Emmanuel Kisiangani. “Somali pirates: villains or victims ? *South African Journal International Affairs* Vol.17, no. 3 (December 2010): p. 370.

The perpetuity of piracy in the Horn of Africa is due the alleged argument of sustaining economy or at least the coastal communities. Piracy has been for long the employment centre of Somalis; fishermen turn into pirates because foreigners' illegal fishing put at risk their sustenance. As such, at shore a piratical industry has been developed to sustain the activity, which in turn results in the appearance of alternative jobs. The unemployment has been identified as another cause for the growth and persistence of piracy. Percy and Shortland state that there is an incontestable truth of the impact of piracy on Somali economy¹⁴⁴. However, the numbers are unknown.

However, questions have arisen about the alleged linkage of pirates to Islamist movements. Nevertheless, this association has been dismissed as a result of the heterogeneity, the ethnography and religiosity surrounding piracy for it brings to mind that pirates "prioritise their clan affiliations above any ideological alliance"¹⁴⁵. In addition, different interpretations of Sharia Law support the question of whether pirates are or not enemies of Islam. There is also acknowledgment of alliances of pirates against Islamist groups¹⁴⁶.

Piracy impact extends also to the environment once oil tankers became their targets. An attempt of an act of piracy can easily risk the ecosystem of the Gulf of Aden and prolong the effects.

The challenge faced by the Horn of Africa, and at the same time transversal to other areas, is the "underreporting issue". As set above a policy of unreported cases has been for long established as a result of the escalation of insurance premiums, and not even incentives could change this practice. The cost of piracy insurance has gone so high, although shippers and insurance companies have been transferring this burden on the final consumers¹⁴⁷. An attempt has been taken to reduce the cost of anti-piracy insurance which is the employment of private security teams by shipowners since 2009.¹⁴⁸ Moreover, Kontorovich states that, on those "hit-and-run incidents or failed attempts", reports have been impoverishing the development of shipping industry with

¹⁴⁴ Sarah Percy and Anja Shortland. "Contemporary Maritime Piracy: Five Obstacles to Ending Somali Piracy." *Global Policy* vol. 4, no. issue 1 (February 2013): p. 66. <http://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12043/pdf>.

¹⁴⁵ Emmanuel Kisiangani. "Somali pirates: villains or victims ?" *South African Journal International Affairs* Vol.17, no. 3 (December 2010): p. 365.

¹⁴⁶ *Ibid.*

¹⁴⁷ Lucas Bento. "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish." *Berkeley Journal of International Law* vol. 29, issue 2 (2011): p.408.

¹⁴⁸ *As Piracy Insurance Gets Pricier, Owners Try Guards*, by Tom Gjelten 8 may 2009, <http://www.npr.org/templates/story/story.php?storyId=103921419> (porn as fonts), accessed 1 December 2013.

the costs of schedule delays¹⁴⁹. Besides, the severity of attacks has been also reiterating the practice “[o]ne example of underreporting is a case in which a vessel was carrying Privately Contracted Armed Security Personnel (PCASP). In March 2012, a video was released of an incident, in which armed guards used significant force against a pirate skiff. This incident was reported to the IMB as the firing of warning shots by the embarked security team, after which the pirates aborted the attack. However, the video shows that meanwhile the ‘warning shots’ are spoken, the actions of the private security team clearly indicate that the skiff and its occupants took heavy fire.”¹⁵⁰ Private security teams have brought another challenge, aside their legal implications, which is: masters have given preference to report firstly an incident in a high risk area to the private security company and at a secondary level to the United Kingdom Maritime Trade Operation.¹⁵¹

Hitherto, the last Resolution of UN Security Council, concerning Somalia, was the Resolution 2125 (2013) which reiterates the condemnation of all acts of piracy, reinforces the importance of a specialised anti-piracy court in Somalia. Highlights the need to prosecute those who incite piracy and expresses its concern of the participation of children in piracy. Renew given authorizations in former resolutions. At last remark, appeals to the cooperation of community to suppress piracy.

¹⁴⁹ Eugene Kontorovich and Steven Art. “An Empirical Examination of Universal.” *American Journal of International Law* vol. 104, no. 3 (July 2010): p. 441.

¹⁵⁰ Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foundation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foundation, 2013. p.32. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹⁵¹ *Ibid.*

2.4.2. Nigeria the core of foreign investment



Figure 2: The Gulf of Guinea¹⁵²

Nigeria with its natural richness became a target for foreign investors. Despite that profit has been decreasing year after year as a consequence of piracy. Piracy endangers microeconomies as well as macroeconomies¹⁵³. Even in economic subject piracy does not compound a single sovereignty. The ship is flagged under one nation, the cargo transported belongs to another one, and besides crew is usually formed by individuals of more than one nationality. So, if we want to consider the economic impact we must also identify until what extend does it effect.

In 2012, reported cases showed the estimated value of the stolen objects and cargo rounded up to \$34-\$101 million, which involved refined petroleum products, property from the crew, ship's stores, company cash and ransom. The numbers of ransoms are secretly kept and the unreported cases do not enter into the general data which precludes the achievement of a real number¹⁵⁴. In the meanwhile, the rating of

¹⁵² Available at <http://www.storm2k.org/phpbb2/viewtopic.php?f=31&t=110953>, accessed on 23 December 2013.

¹⁵³ Lucas Bento. "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish." *Berkeley Journal of International Law* vol. 29, issue 2 (2011): pp.406-409.

¹⁵⁴ Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foudation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foudation, 2013. p.18. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

success of ransoms has dictated the appearance of criminal groups following the same practice. The Movement for the Emancipation of Niger Delta began to attack ships and steal their cargo, and kidnapping began to be one of the *modus operandi* of the insurgents¹⁵⁵.

Nigeria was considered a dangerous zone at a very early stage. There have been reported cases since 1982. Through time, the intensity of violence and the number of cases reported has increased,¹⁵⁶ like in Somalia. This led Lloyd's Joint War Committee to tag the Gulf as a war risk area, which means that the war risk insurance is one of the coverage's for Nigeria waters and surroundings. On the other hand, marine kidnapping and ransom insurance coverage were to be taken into account through the years. The amount of premiums paid for these two insurances is between \$358-427 million in 2012.

Another factor contributing to the growth of the cost associated with piracy is the lack of training of marine police to counterattack piratical incidents, which obliges shipping industry to take their own measures –employment of private armed forces-. It is estimated that around \$150 million were spent in 2012¹⁵⁷ on private security alone. In terms of military cost, between \$100-150 million were spent on training, vessels' acquisitions, patrols and military exercises¹⁵⁸.

The other costs are on the labour and the capacity-building efforts. The former relates to the amount paid to seafarers in Nigeria and Benin waters –high risk area-. The estimated amount for labour cost in 2012 was no less than \$30 million and no higher than \$105 million. The latter translates into the joint effort of Western countries to develop maritime security in the Gulf of Guinea as well as an Australian effort committed to assure human resources¹⁵⁹, between \$2 to 6 million were spent.

However, an alarming number is the one that represents prosecution and imprisonment. It is known that in 2012 the cost was \$0, despite the fact that 11 suspects

¹⁵⁵ Lawal B. Dogarawa "Sustainable Strategy for Piracy Management in Nigeria." *Journal of Management and Sustainability* (Canadian Center of Science and Education) vol. 3, issue 1 (2013): p. 122.<http://dx.doi.org/10.5539/jms.v3n1p119>.

¹⁵⁶ *Ibid.*, pp. 124-125.

¹⁵⁷ Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foundation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foundation, 2013. p.19. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, pp. 20-21.

were detained¹⁶⁰. This situation reveals that the impunity gap remains, and future efforts will only succeed if the Nigerian Forum starts to prosecute pirates effectively and with a range of effectiveness in the Gulf of Guinea. So that the practice of “caching and release” becomes surpass.

Summarizing, the impact on economy only in 2012 surrounded the \$740 to \$950 million¹⁶¹.

For now focusing on the roots of piracy in Nigeria it is known that there are a number of causes that sustain Nigerian piracy and armed robbery. The first one is the lack of technology needed to survey, identify and assist the vessels in transit in Nigeria waters. Another is the absence of the crossing data between the ministry of agriculture and the ministry of transportation results in an unrealistic number of how many vessels are in transit in these waters¹⁶².

Allied to the *supra* absence, there are no surveillance means on the territorial waters of Nigeria, which obstructs the action of hot pursuit. This encompasses not only vessels, but training police and satellites too, which requires the permission to use satellites from third countries¹⁶³.

The social and political instability has caused the proliferation of weapons, which adduces and increases the rate of criminality, the creation of criminal groups and the progression of violence¹⁶⁴.

Like in Somalia, Nigeria also suffers from the stigma of unemployment. Unemployed individuals have been voluntarily entering into gangs and armed militias. Another similarity is the insecurity not only on sea but also on land, where the allocation of resources are less than actually demanded¹⁶⁵.

¹⁶⁰ Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foudation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foudation, 2013. pp. 20-21. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹⁶¹ See *supra* note 156.

¹⁶² Lawal B. Dogarawa “Sustainable Strategy for Piracy Management in Nigeria.” *Journal of Management and Sustainability* (Canadian Center of Science and Education) vol. 3, issue 1 (2013): pp.123-124. <http://dx.doi.org/10.5539/jms.v3n1p119>.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

Finally, it has been reported that pirates have also been attacking for political motivations. Still, this is a subsidiary motivation, remaining private ends the leading motivation of pirates¹⁶⁶.

Considering the flaws and sourceless of Nigeria Navy measures have been taken in order to countermeasure the gaps of Maritime Security. Recently, Nigeria Navy received three boats and a Memorandum of Understanding was signed between Nigeria Maritime Administration and Safety Agency (NIMASA) and the Nigerian Air Force, so that acts such as hot pursuit may be accomplished. In spite of this improvement some challenges remain, such as:

- “Limited assets to enforce maritime laws as well as monitor and secure the Exclusive Economic Zone.
- Rising incidents of an increased sophistication of pirates armed robbery at sea and other unlawful activities in Nigerian waters.
- Theft and illegal ship-ship transfer of oil in Nigerian waters.
- Illegal refining activities in Nigerian waters.
- Marine Pollution in Nigerian waters.”¹⁶⁷

Additionally, other challenges were identified by Dogarawa. Human resources were appointed first: “the death of an experienced master mariner as a result of successful piracy attack can only be replaced after a very long time”¹⁶⁸. Allied to this, once again, there is the subsistence of the difficulty to distinguish fishermen from pirates. The decrease on losses has been another goal to be achieved, since Nigeria is a target of foreign investment, the frame of a global market does not encompass this flaw, so distortions have been appearing. Programs of youth integration are required in order to rehabilitate those who entered into criminal groups and to avoid more from being recruited. Usually, these youths considered outcasts as a consequence of their economical origins leave school and grow up “without parental moral background”¹⁶⁹. As stated in chapter 1.3.2, corruption has to stop, so the “cake” can no longer be

¹⁶⁶ See *supra* note 159.

¹⁶⁷ *Nigeria Intensified Her Effort in Maritime Security*, see http://themaritimehub.wordpress.com/2013/10/19/nigeria-intensified-her-effort-on-maritime-security/?goback=.gde_98514_member_5797163141884297216#! accessed on 29 November 20103.

¹⁶⁸ Lawal B. Dogarawa “Sustainable Strategy for Piracy Management in Nigeria.” *Journal of Management and Sustainability* (Canadian Center of Science and Education) vol. 3, issue 1 (2013): p. 125. <http://dx.doi.org/10.5539/jms.v3n1p119>.

¹⁶⁹ *Ibid.*

deviated, but instead distributed and invested for the wealth of Nigerian people. Another activity to be stopped is the illegal oil bunkering and a last remark take into account the environment and pollution that has been dictating the impoverishment of fisheries, farms and potable water for drinking and domestic use¹⁷⁰.

Once again the policy of unreported cases has also been established in these waters. For example, IMB had 43 vessels that reported piratical incidents; however, Risk Intelligence¹⁷¹ estimated that 89 vessels were attacked in 2012. The policy of incentives to stimulate reports was mentioned by Kontorovich¹⁷², but its use is not yet implemented in the Gulf of Guinea. The incentives translate into the military response in case of an attack. Nevertheless, the degree of reaction is below or non-existent *vis-a-vis* Somalia¹⁷³. The reasons of underreporting are the same denounced by Kontorovich¹⁷⁴.

Since 2011 the UN Security Council has adopted resolutions as a result of the growing menace of piracy and armed robbery. Resolution 2018(2011) demonstrates its concern, appeals to the cooperation of states and organizations and Secretary-General's assessment mission on the threat.

Resolution 2039 (2012) welcomes the report concerning to the Gulf of Guinea, the urgency to stop the acts of piracy and armed robbery by the States of the Gulf (as a first response) and through international cooperation.

¹⁷⁰ See *supra* note 165.

¹⁷¹ "Risk Intelligence provides consulting services to private and governmental clients on security threats and risks. Risk Intelligence has been specialising in analysing threats from and interaction between piracy, organised crime, terrorism, insurgency and military conflicts since 2003." see <http://www.riskintelligence.eu/about/> accessed on 1 December 2013.

¹⁷² See *supra* note 105.

¹⁷³ Kaija Hulburt and D. Conor Seyle [et al.]. *The Human Cost of Maritime Piracy 2012*. Report, project Oceans Beyond Piracy, One Earth Future Foundation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foundation, 2013. p.33. Available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹⁷⁴ See *supra* note 105.

3

How to prosecute and prevent piracy?

As discussed in the previous chapters' enforcement of the law has been the "Achilles heels" to repress piracy. Thus, we intend to study several solutions to counterattack modern piracy and attend to the use of universal jurisdiction to prosecute pirates. Allied to this study the methodology of system dynamics is also going to be addressed in order to observe the incursion of the possible responses.

3.1. The role of Universal Jurisdiction

Piracy is known as the "original universal jurisdiction crime". The principle of universality allows States to detain and prosecute offenders wherever they perpetrated the crime. The gravity and heinousness of the crime gives reasonable grounds to any State to try pirates, although no nexus is demanded. The nature of the offense, disrespect for human rights, extends the enforcement jurisdiction of States on behalf of the security and peace of the international community.

Universal jurisdiction seeks what is commonly known as universal justice. However, this universal justice is constrained by political interests. Limited by the political game of sovereignties the role of the principle universality diminishes when it takes to prosecute certain crimes under international criminal jurisdiction. In those cases domestic courts are the entitled bodies to pursue with criminal prosecution¹⁷⁵.

Piracy has been perceived as a threat to peace and international security, even though it remains valued as a transnational crime to be prosecuted under domestic jurisdiction and not by the International Criminal Court. So, international cooperation has been the chosen and executable path to repress piracy. Nevertheless, the theoretical path has remained a constant when it covers piracy. Scholars have always noticed that the number of pirates prosecuted under universal jurisdiction are less than we could suspect and this reality remains as so.¹⁷⁶ Instead of a mandatory universal jurisdiction, the suppression of piracy relies on a right that was given to States as a consequence of the gravity of the perpetrated offence. Gavouneli in her book highlights the following:

¹⁷⁵ Rahim Hesenov. "Universal Jurisdiction for Interantional Crimes - A Case study." *Spinger*. 16 December 2012. pp. 275-283. <http://link.springer.com/article/10.1007%2Fs10610-012-9189-8#page-1>.

¹⁷⁶ Eugene Kontorovich . "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foudation." *Harvard International Law School* vol. 45, no. 1 (Winter 2004): p. 192.

“(…) exists a distinction between treaty-based universal jurisdiction, which is almost mandatory, whereas it seems that the customary form of universal jurisdiction is always permissive.”, ending that piracy, even if contractually codified, is the preeminent example of this last reality.¹⁷⁷ In a further study Kontorovich and Art bring “An Empirical Examination of Universal Jurisdiction for Piracy”¹⁷⁸, where they elucidate the rate of pirates prosecuted under universal jurisdiction, between 1998 and 2009. One of the first conclusions is that China, India, Kenya and Yemen were the only states to prosecute pirates under universal jurisdiction, besides the prosecutions occurred in the area where the crime was perpetrated.¹⁷⁹ There were scholars who are of the opinion that the universal jurisdiction for the prosecution of pirates had fallen, because of its rare use, however Kontorovich and Art side-by-side, with other scholars, reaffirm that the non-use of universal jurisdiction by states does not determine its uselessness on the prosecution, and moreover, its enforcement was reiterated in several resolutions of the UN Security Council.¹⁸⁰ Additionally, universal jurisdiction is seen as a subsidiary mechanism that fills any gap that may arise from the lack of response of domestic jurisdiction.¹⁸¹

Kontorovich and Art showed that universal jurisdiction continues to reveal an ephemeral rate of prosecution, from the 1158 reported piratical incidents under the quoted jurisdiction only seventeen attacks were brought into justice. They came into conclusion that per sixty-eight attacks only one is trial.¹⁸² Despite of its *crescendo* in Somalia, the authors detected that the rate of the prosecution subject to universal jurisdiction does not attain to what reality draws.¹⁸³ As it showed above (UNCLOS limitations), the problem relies on the enforcement of the law. The success of the enforcement of universal jurisdiction depends on the available resources of states, which includes economical, human and technological. The scarceness of naval resources, its management, maintenance and the adjacent risk led States to not make use of its right to

¹⁷⁷ Maria Gavouneli. *Functional Jurisdiction in the Law of the Sea*. Edited by Vaughan Lowe. Vol. V. 62. Leiden: Martinus Nijhoff Publishers, 2007. p.25.

¹⁷⁸ Eugene Kontorovich and Steven Art. “An Empirical Examination of Universal.” *American Journal of International Law* vol. 104, no. 3 (July 2010): pp. 436-453.

¹⁷⁹ *Ibid.*, pp. 437-438.

¹⁸⁰ *Ibid.*

¹⁸¹ MASOL, Sergii. “Jurisdictional Problems Relative to the Crime of Piracy off the Coast of Somalia.” *Academia.edu*. n.d. p.4.
http://www.academia.edu/1834079/JURISDICTIONAL_PROBLEMS_RELATIVE_TO_THE_CRIME_OF_PIRACY_OFF_THE_COAST_OF_SOMALIA.

¹⁸² Eugene Kontorovich and Steven Art. “An Empirical Examination of Universal.” *American Journal of International Law* vol. 104, no. 3 (July 2010): p. 444.

¹⁸³ *Ibid.*, p.445.

prosecute pirates. Kontorovich and Art state “until 2008, states essentially ignored universal jurisdiction over piracy, but not for the lack of pirates. This is itself noteworthy, since international law gives nations an unusual explicit affirmative duty to repress piracy outside their territory.” However, universal justice cannot be achieved without international cooperation. The surveillance of the seas requires the binding efforts of States.¹⁸⁴ The commitment of efforts does not only come from the surveillance of high seas, but also from a regional response to trial pirates under universal jurisdiction, which has been leading by Kenya, Seychelles and Yemen. Those actions were welcomed by the UN Security Council. Finally, the gravity of the crime has been an *agrément* to the desuetude of universal jurisdiction. As mentioned above, scholars commonly agree that piracy does not achieve the level of heinousness of the core of international crimes. As such, the piracy rate of prosecution subject to universal jurisdiction is undoubtedly lower than the core of international crimes.¹⁸⁵

3.2. Legal Response

The Resolution 1918 (2010) brings to the light “the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspect pirates,”¹⁸⁶ and “[r]equests the Secretary- General to present (...) a report on possible options (...) for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals (...).”¹⁸⁷

Attending to the location of the attacks states with territorial jurisdiction and personal active jurisdiction should be the primarily responses to prosecute pirates. However, this solution comes to be inapplicable, since Nigeria and Somalia do not have the necessary requirements and means to prosecute pirates. As it already been studied, Somalia still depends on international cooperation for its fortification. Without a navy it is impractical that Somalia could survey territorial waters, besides the Somalia government does not have *de facto* control of all territory. Moreover, its judicial system

¹⁸⁴ Eugene Kontorovich and Steven Art. “An Empirical Examination of Universal.” *American Journal of International Law* vol. 104, no. 3 (July 2010): pp.449-450.

¹⁸⁵ *Ibid.*, p.452.

¹⁸⁶ UN Security Council Resolution 1918 (2010), p. 1. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1918%282010%29&referer=http://www.un.org/en/sc/documents/resolutions/2010.shtml&Lang=E

¹⁸⁷ *Ibid.*, p. 3.

does not meet international standards for the respect for human rights. So, it is quite plausible that Somali pirates may face inhuman treatment and torture.¹⁸⁸ On the other hand, Nigeria has been upgrading its maritime security with proper means. However, the growth of naval response is not enough by itself. This should be accompanied by the Nigeria judicial system, which has the duty to trial pirates and restore victims' dignity. Nevertheless, we cannot forget the constraints on collecting evidences, once there are no specialised teams to secure its non-contamination or destruction, which is transversal to other countries.

Another response could be given by the International Criminal Court (ICC). However, scholars do not agree in its inclusion in the core of international crimes, since piracy does not offend at the same rate of gravity or seriousness, such as is the case of crimes against humanity in the countries and war crimes committed quite often by most of the countries of the world. Piracy remains to be seen as crime that threatens economy and not necessarily human dignity. Besides, the limited resources of ICC are another obstacle to the prosecution of pirates, which has been growing in the last years culminating in what is labelled as an epidemic. Even though, another current of scholars has been defending its inclusion based on a broader interpretation of crimes against humanity. Middelburg does not support this last current; nonetheless she draws two conceivable inclusions through an amendment or protocol to the Rome Statute. An easiest and less problematic way to its inclusion would be through a protocol, which does not unite the States that ratified the Rome Statute, but affects only those who ratified the protocol not mattering if those States ratified the original treaty or not.¹⁸⁹ Finally, if a broader interpretation is not desirable to include in the scope of crime against humanity, a tactful approach must be taken once piracy has been threatening peace and degrading human dignity. Pirates have been inflicting more and more violence and disregard from the dignity of seafarers and their families in each attack they lead. Additionally, slavery has been identified as one of the recent practices, subduing a human life to another, even if for eleven months, cannot be acceptable and seen as something that does not breach human dignity. The dignity of a human being cannot be something at the disposal of states' interest, neither measurable in compliance with its diplomatic games. Thus, a closer look must be taken when one views the human

¹⁸⁸ Annemarie Middelburg, *Piracy in a Legal Context: Prosecution of Pirates Operating off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp. 45-50.

¹⁸⁹ *Ibid.*, pp. 51-53.

implications that piracy carries, since piracy is no longer merely an act of robbery at sea.

The abovementioned leads us to study a third option to prosecute pirates which is to be taken by the captors States. Since UNCLOS does not determine by whom pirates should be trialled, captors' States have transferred the detainees to third States. This reality reveals that captor States are not willing to bring pirates to their country for trial. Besides, there are too many implications as aforementioned in chapter 2, such as asylum claims, procedural constrain and the non-uniformity of the law related to the definition of piracy.¹⁹⁰

Recently, there are 21 States committed to put an end to piracy. However, they do not share a single definition. Some states adopted the definition of UNCLOS, others broaden it, and there are cases of singular definition. For example, the UK adopted the definition established by UNCLOS, Seychelles broadens the definition and Japan clarified the definition detailing the acts of piracy given by article 101 of UNCLOS.¹⁹¹ Since the UNCLOS definition present gaps there is a doctrine that claims to a change of international definition on piracy, and achieved uniformity at international level this should be followed by the domestic jurisdictions. Chang¹⁹² reveals that such approach would be ineffective, because the type of piracy followed in each region differs from the others. Besides, its enforcement requires the compliance of domestic jurisdictions, being impractical to guarantee that States would "take the necessary measures to pass legislation that applies the new definition."¹⁹³

In line with the prosecution by the flag States, the transference of detainees to third States also gives rise to questions of human rights and diplomatic agreements do not bind States to respect human rights. The willingness of third states to prosecute pirates is based on a program of assistance from the EU-UNODC counter-piracy program. As aforementioned, this program aims to cover the costs of trial and at the

¹⁹⁰ Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp. 55-58.

¹⁹¹ For further developments see "Piracy Definitions in Domestic and Regional Systems" at http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Flaw.case.edu%2Fwar-crimes-research-portal%2Fshow_document.asp%3Fid%3D321&ei=QX-3UqzCG6iS7Qb7yIGQCg&usg=AFQjCNEu7isKpIHHQJ_-O9fX6DWEZULdcg&bvm=bv.58187178,d.ZGU

¹⁹² Diana Chang. "Piracy Laws and the Effective Prosecution of Pirates." *Boston College International and Comparative Law Review* vol. 33, issue 2 (January 2010): pp. 284-288. Available at <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3>.

¹⁹³ *Ibid.*, p. 286

same time develop their judicial systems. For instance, European assistance covers “salaries, logistics, police training, office equipment, prison services and investments in the Kenyan judicial system.”¹⁹⁴ Previously, we only mentioned agreements with Kenya, Seychelles, and Yemen, since 2010 Tanzania joined as a venue to prosecute pirates. In the same year, Mauritius revealed a will to prosecute pirates¹⁹⁵ and in the following year this country put the programme into effect. In 2011 the Piracy and Maritime Violence Act was approved, entering into effect in June 2012. In 2013 the transference of the first pirates suspects was made to Mauritius.¹⁹⁶ Presently, the programme assists: “Somali Basin region-Kenya, Seychelles, Mauritius, Tanzania, Maldives and Somalia.”¹⁹⁷ Attending to the importance of this programme we present the following results:

0	Number of piracy trials failed due to lack of trial support
4	Number of courtrooms constructed or under construction
6	Number of piracy prosecuting centres that have received support from UNODC
9	Number of prisons holding piracy prisoners constructed, refurbished or underway
46	Number of hostages helped to return home by UNODC
300	Number of Somali pirates prosecuted or awaiting trial in Seychelles, Kenya and Mauritius
350	Number of police officers, prosecutors, judges and prison staff who have participated in UNODC organised learning exchanges
400	Number of Somali prison staff trained
500	Number of days of interpretation delivered
600	Number of prisoners provided with welfare support
1200	Number of piracy prisoners held around the world
1400	Number of international standard prison spaces provided under the programme
2009	Year that the UNODC Counter Piracy programme started

Figure 3: Counter Piracy Programme in Numbers¹⁹⁸

Middelburg presents a fifth solution which embraces the creation of an Ad Hoc Piracy Tribunal. At the time, piracy was not accepted by the Security Council as a

¹⁹⁴ Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operating off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. p. 68.

¹⁹⁵ *Ibid.*

¹⁹⁶ For additional informations see Counter Piracy Programme, issue eleven: March 2013, in http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf

¹⁹⁷ Available at <http://www.unodc.org/unodc/en/piracy/> accessed on 23 December 2013.

¹⁹⁸ Counter Piracy Programme, issue eleven: March 2013. p.2. in http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf

threat to peace and security at an international level, and today it remains as soon so. Regarding Resolution 2125 (2013) Security Council keeps with the same expression piracy “continues to constitute a threat to international peace and security in the region.”¹⁹⁹ Since it does not constitute a threat to peace and security at an international level in the eyes of Security Council, an international piracy tribunal cannot be established under the chapter VII of the UN Charter.²⁰⁰ Middelburg recognises that even if piracy does not achieves the same levels of heinousness of those prosecuted under ICC, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY), nowadays is a real threat to international peace and security. Corroborating her thesis based on the following arguments:

- “Piracy hampers the stability and safety of international trade”;
- “(...) threatens property and ships, endangers critical seas lines of communication and the free flow of commerce”;
- “(...) undermines humanitarian aid, food security and stability in the region”; and
- “Finally, piracy is a mordant to political and social development, disrupting economic growth.”²⁰¹

In spite of taking this position she reveals the advantages and disadvantages of this solution. Ad Hoc Tribunals bring advantages such us: uniformity, “create its own capacity and resources”, overpasses the lack of will to prosecute pirates, “collect evidence and use specialised indicters”, and detail the acts mentioned in article 101 UNCLOS. As disadvantages: it is a lengthy process, with an expensive annual budget, there are reservations concerning into its efficiency and a prevention aim would be replaced by the punish one.²⁰²

Middelburg also refers the possibility to create a Hybrid Tribunal²⁰³, however she gives more credit to the solution aforementioned -creation of an Ad Hoc Piracy Tribunal. Conversely, Lee unveils favourable arguments to the creation of Hybrid

¹⁹⁹ UN Security Council Resolution 2125 (2013), p. 5. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2125%282013%29

²⁰⁰ Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp. 75-77.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, pp.78-80.

²⁰³ For further developments see Annemarie Middelburg. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011. pp.80-82.

Tribunals. These tribunals “provide an effective method of bridging the gap between supranational and domestic responses to piracy”²⁰⁴, since its jurisdiction is based on a combination of domestic and international law. Further, it is a “cooperative effort between national governments and international organizations, and employs both domestic and international judges.”²⁰⁵ He sets apart the creation of an international tribunal, since it is meant to prosecute crimes against humanity. Besides, hybrid tribunals “have played an important role in enhancing criminal prosecutions in nations lacking sufficient judicial resources”²⁰⁶ and eliminate the conflict of concurrent jurisdictions.²⁰⁷ Another argument, hybrid tribunals do not supplant the role of developing nations, since its regime combine domestic legal regimes and talents with international, and attract the international investment to the progress of judicial system from developing countries. Nevertheless, this author remarks that harmonisation would be disregard if the court was primarily a domestic product.²⁰⁸ Hybrid tribunals’ legitimacy derivate from is similar culture and its effectiveness due the closeness to the area where the crime is perpetrated.²⁰⁹ Finally, Lee does not discard regional tribunals as a solution to take into account, however he justifies that “[h]ybrid tribunals may offer a third path, on that respects sovereignty through their integration with domestic tribunals, while still maintaining a level of international involvement and cooperation.”²¹⁰

Another thesis is supported by Chang. This author defends the creation of regional piracy tribunals. The respect for the territorial sovereignty is the first argument given by this author. Additionally, the nature of a regional tribunal allows the adoption of a regional definition of piracy and provides “a uniform criminal procedure and punishment.”²¹¹ A regional scope including territorial seas and the high seas can be also

²⁰⁴ Andrew Lee. “Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals.” *One Earth Future Foundation* . 10 July 2010. p. 5. <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Hybrid-Tribunals-Andrew-Lee.pdf>.

²⁰⁵ *Ibid.*, p.7.

²⁰⁶ *Ibid.*, p.8.

²⁰⁷ *Ibid.*, pp.9-10.

²⁰⁸ Andrew Lee. “Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals.” *One Earth Future Foundation* . 10 July 2010. p.14. <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Hybrid-Tribunals-Andrew-Lee.pdf>.

²⁰⁹ *Ibid.*, p. 15.

²¹⁰ *Ibid.*, p. 18.

²¹¹ Diana Chang. “Piracy Laws and the Effective Prosecution of Pirates.” *Boston College International and Comparative Law Review* vol. 33, issue 2 (January 2010): p. 285. Available at <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3>

envisioned, avoiding of jurisdictional conflicts and finally speedy prosecutions will be noticeable, once they are not limited by political interferences.²¹² In 2006, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) entered into force, and it is expected that regions adopt such solution.

UN Security Council defends the creation of a specialised anti-piracy court in Somalia and in the surroundings states, being this position reiterated in the Resolution 2125 (2013). These courts are meant to be assisted by the international community, because of the lack of resources, although the applicable law is the national one. National laws must be reformulated in order to punish piratical attacks not only within boundaries, but also with extraterritorial scope.²¹³

Tribunal Type	Description	Source of Jurisdiction
International	Created to try matters of international importance, under the aegis of the United Nations. They may be requested by states to deal with matters, such as genocides, that would overwhelm those states' domestic judiciaries.	Derived from U.N. Charter Chapter VII powers, or through negotiation with a requesting state.
Regional	Created through multilateral treaties involving multiple states in a given geographic region. The subject matter of the court can be as broad or narrow as the treating states desire.	The powers exercised by these courts are derived from the terms of the enabling treaties.
Hybrid	Created as cooperative ventures between the U.N. and a requesting state. All currently existing hybrid tribunals deal exclusively with criminal matters.	Hybrid tribunals have, to date, been created with authority deriving from an international authority (the U.N.) and the hosting nation's domestic laws.
Domestic	"Traditional" courts, created to deal with matters arising within a state.	Domestic laws vest these courts with specific or general authority to hear cases. In domestic piracy trials, memoranda of understanding allow one state to receive and try suspected pirates captured by foreign countries that are parties to those memoranda.

Table 2: Tribunal Types²¹⁴

²¹² Diana Chang. "Piracy Laws and the Effective Prosecution of Pirates." *Boston College International and Comparative Law Review* vol. 33, issue 2 (January 2010): pp. 285-286. Available at <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3>

²¹³ Specialised anti-piracy courts is the solution envisioned in the reports S/2011/360 and S/2012/50 available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202011%20360.pdf> and <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202012%2050.pdf>, respectively.

²¹⁴ In Andrew Lee. "Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals." *One Earth Future Foundation* . 10 July 2010. p.7. <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Hybrid-Tribunals-Andrew-Lee.pdf>.

Taking into account what has been mentioned earlier, we first were persuaded to adopt the fifth solution given by Middelburg –Ad Hoc Piracy Tribunal-. Nonetheless, piracy is still not being regarded as an international crime, but instead as a transnational crime. Considering reality we are balanced between the hybrid solution and regional one.

3.3. System dynamics

The solution of piracy does not have a single response, it cannot be treated as a linear solution: a cause and an effect. The reality is far more complex, however we must take into account, as for example the fishermen in Somalia. In the system we are going to study about the community of fishermen as the core-stock. Furthermore, there will be several inputs that will act in the community of fishermen and most important how they act on it. From these distortions the feedback can be positive or negative, and from one single input appears a microsystem. Every microsystem encompasses loops that act on the fishermen community, loops have their own core of vitality and simultaneously microsystems interact among them.

Barry and Staver created a model of piracy to Somalia and relying on the fishermen community we are going to study how each microsystem acts: police demand sector, police sector police supply factor, pirates sector, pirate attractiveness sector, captivity sector. Before, we studied each microsystem the authors make an advertence: “[t]here are three negative loops: Piracy Earnings, Police Capture, and Police Effect.”. Thus, the pirates number increases as a consequence of the growth of pirates income, and immediately the police responds enhances. This conjuncture leads to the raise of police threat and subsequently decreases the earnings of pirates. Police Capture loop shows how the number of pirates detained reduces the number of pirates. Finally, the Police Effect demonstrates how the increase number of pirates leads to the decrease of earnings per pirates.²¹⁵

²¹⁵ Laura Barry and Benjamin Staver. “A Study in Maritime Piracy. advised by Oleg Pavlov.” Report for the Degrees of Bachelor of Science, Faculty of the Worcester Polytechnic Institute, May 2009. pp.15-16. http://www.wpi.edu/Pubs/E-project/Available/E-project-050709-150551/unrestricted/A_Study_in_Maritime_Piracy.pdf.

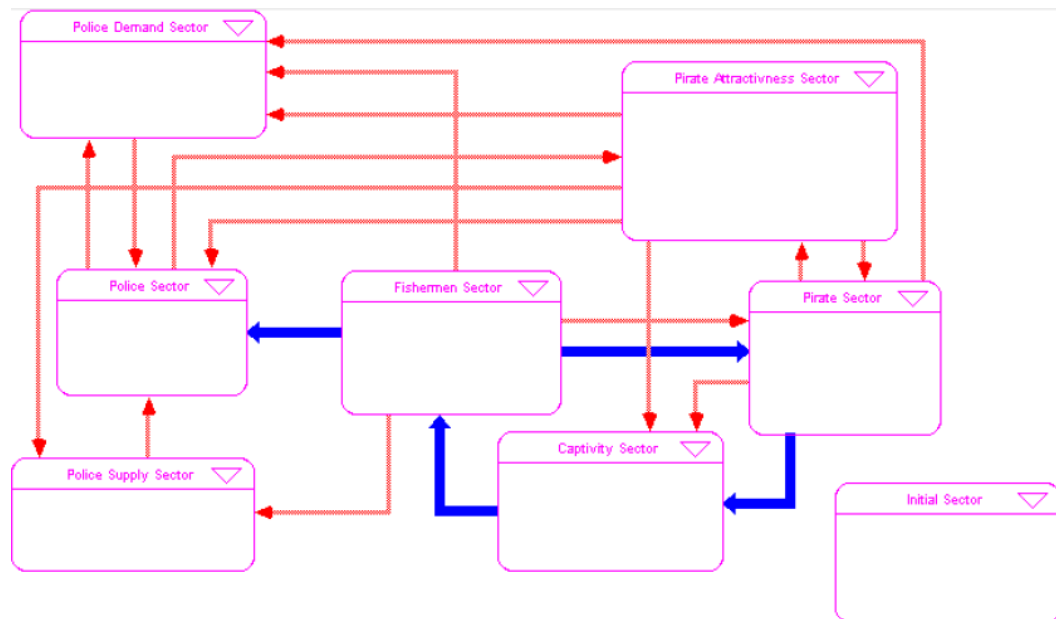


Figure 4: The Pirate Fisherman Model²¹⁶

Analysing at first the Fisherman Sector, this microsystem may fork in two stocks: pirates and police, foreseeing that pirates or police may return to their stage of fishermen.²¹⁷

Instead, Police Sector redounds on fishermen becoming police. However, since fishermen must be trained, the time in training represent a delay which is fulfilled by external forces. Over the time the number of internal forces grows. However, we must take into account that the entrance of external forces becomes a disincentive to the creation and development of internal forces. The Police Supply Sector balances the number of police and fishermen considering the income of each stock. If police stock increases piracy becomes unattractiveness. The Police Demand Sector embraces variables, such as: marginal efficiency of police, desired additional police and lawlessness. High ranges of efficiency increases the number of detained pirates. The escalation of pirates induces to a desired of additional police. And if a considerable grade of lawlessness not accompanied by anomie stage it is visible a desire additional force appears.²¹⁸ EU-UNDOC programme have been investing for the creation of an internal police in order to reduce the external presence in the territory. Besides the

²¹⁶ Laura Barry and Benjamin Staver. "A Study in Maritime Piracy, advised by Oleg Pavlov." Report for the Degrees of Bachelor of Science, Faculty of the Worcester Polytechnic Institute, May 2009. p.16. http://www.wpi.edu/Pubs/E-project/Available/E-project-050709-150551/unrestricted/A_Study_in_Maritime_Piracy.pdf.

²¹⁷ *Ibid.*, p.18., p. 18.

²¹⁸ *Ibid.*, pp.17-18 and 22-23.

presence of international forces within Somalian territorial waters and attacks to the land bases have been determining the decrease of lawlessness in the country.

Pirate Sector also presents a delay, which is the required time for fishermen to become pirates. Subsequently, the stock of pirates enlarges if the attractiveness is high and successively piracy threat also increases. The success or failure of piratical attacks determines the earnings of pirate, in the same way the earnings per pirate will be affected by the number of pirates and so the attractiveness depends on the growth or not of the earnings.²¹⁹ Currently, Somalia presents a decrease of the number of attacks as a reaction of the presence of international forces- Task Force 151²²⁰ - in the Gulf of Aden and within Somalian territorial waters. The presence of police led pirates' leaders to redirect its activities to illegal fishing "offering" services of private security to illegal fishing vessels.²²¹ In the past five years, there were discussions relating to the non-payment of ransoms in order to decrease the earnings of pirates. However, this response did not gain supporters, since human cost would escalate with the growth of fatalities.

The Captivity Sector is a microsystem that interferes in the sectors aforementioned, since captured pirates may be rehabilitated and be reintegrated in the fisherman stock or not.²²²

When focusing on Nigeria the methodology cannot be applicable with the same model. Another one must be built in order to introduce the new variables that will be identified on the ground and tested how they work inside the different groups - loops – that could affect the increase / decrease movements in the macro space of piracy. As mentioned above, Nigeria presents different features such as: the presence of a central authority, piracy attacks in this area encompass subjective motivation, the main targets are oil tankers, as we studied in the subchapters 1.3.2 and 2.4.2.

²¹⁹ Laura Barry and Benjamin Staver. "A Study in Maritime Piracy. advised by Oleg Pavlov." Report for the Degrees of Bachelor of Science, Faculty of the Worcester Polytechnic Institute, May 2009. p.19.http://www.wpi.edu/Pubs/E-project/Available/E-project-050709-150551/unrestricted/A_Study_in_Maritime_Piracy.pdf.

²²⁰ Combined Task Force 151 appeared with a specific mandate counterattack piracy, being authorised by the UN Security Resolution 1816 and following.

²²¹ In The UN Security Council Report on Somalia of the Monitoring Group on Somalia and Eritrea 2013, p. 100, available at http://www.hiiraan.com/images/2013/July/UN_Report_PDF.pdf

²²² Laura Barry and Benjamin Staver. "A Study in Maritime Piracy. advised by Oleg Pavlov." Report for the Degrees of Bachelor of Science, Faculty of the Worcester Polytechnic Institute, May 2009. p.20. http://www.wpi.edu/Pubs/E-project/Available/E-project-050709-150551/unrestricted/A_Study_in_Maritime_Piracy.pdf.

Conclusion

Piracy existed since humans start to navigate and since time immemorial and when the navigational activities started. It was considered an uncivilised act was condemned by the society and the States. Moreover, pirates' attacks were induced by the greed and their conduct was classified as robbery at sea. This reality remains until today.

As has been discussed and pointed out above about the history of piracy, it was considered as a crime if it opposed the interests of a nation. However, the same piracy could be considered as a lawful act if committed by a State or Nation, and if complaint or claimed by the suffered ones it was denominated act of privateers. Even though, as it has been noticed along the history that it was although organised or commissioned by some States or at least they had full knowledge of such crimes committed by one of their own men of the State, it was completely ignored by the same state authorities. But during the course of time this situation started to take different shape as the pirates or illdoers were caught red handed and were taken to justice. This led the states to take positive steps which means new anti-piratic laws started to appear. During the passage of time the same were ratified by the different States and the countries keeping in mind various nuances and difficulties which came to light. International jurisdictions and the courts were set up for the trial and punishment of the pirates which we have tried to study in the present dissertation. On the other hand, international organisations started to take serious steps against piracy obliging the States or countries involved (means the origin States of the pirates) to take active part in it and pay the losses suffered by the victims. The human rights activists took more serious steps in demanding not only by the States or the governments to interfere and punish even more severely the pirates who not only robbed the ships but also mistreated the crew members and the passengers when during their illegal actions of the pirates they were captured. The demand of human rights activists has now become a major concern of the pirates as they are aware of the severity of the punishment and condemnation by general public opinion.

However, as has been discussed earlier piracy has been considered as an epidemic. That encompasses a role of legal issues. Besides, the difficulty of repressing piracy not only relies on its punishment, but most important in its prevention. On the

other hand, as it has also been seen earlier in the previous chapters repressing piracy and after capturing the pirates, to decide their punishment have been difficult for the courts as the pirates, quite often found belonging to more than one nationality and as noticed, to many unidentified countries. Moreover during the course of arrests and remand they also requested political asylum which furthermore complicated the job of the pirate combating authorities.

Decreed and organised by several organisations such as UN, IMO and IMB, NATO, RECOFI, ReCAAP, MPHRP, One Earth Foundation, EU-UNDOC, NIMASA, CGPCS, created numerous laws and theories, such as *Mare Libervm*, *Pax Britannica*, Convention on the High Seas, UNCLOS and SUA Convention, Geneva Convention, UNCAT, ICCPR, ECHR, ACHR, VCCR were brought to light to combat pirates and to provide assistance to those who suffered from their misdeeds in the seas.

Nevertheless, this organisations and human rights activists did not forget to take into account the rights of even of those who only do harms to the shipping, economy and to the people. These organisations also wanted to improve the situation in the prisons of various countries and obliged them to respect human rights and resources.

In conclusion, although we may not be very sure of it, that most of the organisations, countries and courts would be able to do away with piracy as there are so many loopholes that have been found by the theorists and authors of the law making. Not only that, there are countries which support and provide shelter to the pirates for their own political interests, whereas there are others which combat against it as their interests are damaged. Therefore, piracy is not one single crime done by some disparate people for their personal gains and interests. Can we really finish with the piracy and harms done to innocent people once for all? No it does not seem likely.

Bibliography

Books

- AHMAD, Afzal. *Indo- Portuguese diplomacy during the 16th and 17th centuries (1500-1663)*. New Delhi, India: Originals, 2008. pp. 51-70.
- . *Portuguese Trade and Socio-Economic Changes on the Western Coast of India 1600-1663*, New Delhi, India: Originals, 2000. pp. 33-60
- BASSIOUNI, M. Cherif. *Introduction to International Criminal Law*. New York: Transnational Publishers, Inc., 2003.
- BOVEN, Theo van. "Categories of rights." In *International Human Rights Law*, edited by Daniel Moeckli [et al.]. Oxford: Oxford University Press, 2010. pp. 173-188.
- BRANCO, Alberto M. Vara. *O Contributo dos Mass Media no Ensino da História*. Lisboa: IIE, 2002.
- CASSESE, Antonio. *International Law*. 2nd edition. Oxford: Oxford University Press, 2005.
- . *International Criminal Law*. Oxford: Oxford University Press, 2003.
- CLAPHAM, Andrew. *Human Rights: a very short introduction*. Oxford: Oxford University Press, 2007.
- CRYER, Robert, [et al.]. *An Introduction to International Criminal Law and Procedure*. Cambridge: Cambridge University Press, 2007.
- ELLEMAN, Bruce A., [et al.]. *Piracy and Maritime Crime: Historical and Modern Case Studies*. Edited by Bruce A. Elleman, Andrew Forbes and David Rosenberg. Rhode Island: Naval War College Press, 2010.
- GARNER, Bryan A., ed. *Black's Law Dictionary*. 8th. Thomson West, 2004.
- GAVOUNELI, Maria. *Functional Jurisdiction in the Law of the Sea*. Edited by Vaughan Lowe. Vol. V. 62. Leiden: Martinus Nijhoff Publishers, 2007.

- GIDDENS, Anthony. *Runaway World: How Globalisation is Reshaping our Lives*. 2nd. London: Profile Books, 2002.
- GOODWIN-GILL, Guy S. and MCADAM, Jane. *The Refugee in International Law*. 3rd. Oxford: Oxford University Press, 2007.
- GROTIUS, Hugo. *On the Law of War and Peace*. Translated by A.M. A.C. Campeell. Ontario, Canada: Batoche Books, 2001.
- . *The Freedom of the Seas*. Edited by James Brown Scott. Translated by Ralph Van Deman Magoffin. New York: Oxford University Press, 1916.
- GUEDES, Armando M. Marques. *Direito do Mar*. 2ª edição. Coimbra: Coimbra Editora, 1998.
- GUILFOYLE, Douglas. *Shipping Interdiction and the Law of the Sea*. New York: Cambridge University Press, 2009.
- GUZMAN, Andrew T. *How international Law Works: a rational choice theory*. Oxford: Oxford University Press, 2008.
- KRASKA, James. *Contemporary Maritime Piracy: international law, strategy and diplomacy at sea*. California: ABC-CLIO - Praeger, 2011.
- LEWIS, I.M. *Making and Breaking States in Africa: The Somali Experience*. Trenton: NJ: Red Sea, 2010.
- MARTINEZ, Jenny S. *The Slave Trade and the Origins of International Human Rights Law*. New York: Oxford University Press, 2012.
- MAY, Larry. *War Crimes and Just War*. New York: Cambridge University Press, 2007.
- MEJIA JR, Maximo Q., CARIOU ,Pierre, WOLFF, François-Charles. "Piracy in Shipping." In *The Blackwell Companion to Maritime Economics*, by Wayne K. Talley, West Sussex: Wiley-Blackwell, 2012. pp. 346-370.
- MELLO, Celso D. de Albuquerque. *Alto-Mar*. Rio de Janeiro: Renovar, 2001.
- MIDDELBURG, Annemarie. *Piracy in a Legal Context: Prosecution of Pirates Operatting off Somalia Coast*. Nijmegen: Wolf Legal Publishers, 2011.

- PENA, Abel N. *Espártaco Epicteto e outros Escravos: Pirataria e Escravatura na Roma Antiga*. Vultos da Antiguidade. Edited by coord. Marina Cristina Pimentel. Sintra: Editorial Inquérito, 1996.
- RUBIN, Alfred P. *The Law of Piracy*. Newport, Rhode Island: Naval War College Press, 1988.
- SHANE, Jon M. and LIEBERMAN, Charles A. “Criminological Theories and the Problems of Modern Piracy.” In *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century*, by M. R. Haberfeld and Agostino von Hassel. Dubuque, LA: Kendall Hunt Publishing Company, 2009. http://jonmshane.com/Maritime_piracy.pdf.
- SHAW, Malcom N. *International Law*. 5th. Cambridge: Cambridge University Press, 2005.
- SOUZA, Philip Charles de. *Piracy in the Ancient World: from Minos to Mohammed*. Ph.D Thesis in History, London: University of London, 1992.
- The New Caxton Encyclopedia*. Vol. 14. London: Caxton & English Educational Programmes International Limited, 1986.
- TOMUSCHAT, Christian. *Human Rights: Between Idealism and Realism*. 2nd. Oxford: Oxford University Press, 2008.

Articles

- BENTO, Lucas. “Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish.” *Berkeley Journal of International Law* vol. 29, issue 2 (2011): pp. 399-455. <http://scholarship.law.berkeley.edu/bjil/vol29/iss2/1>.
- CHANG, Diana. “Piracy Laws and the Effective Prosecution of Pirates.” *Boston College International and Comparative Law Review* vol. 33, issue 2 (January 2010): pp. 273-288. <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3>.
- DOGARAWA, Lawal B. “Sustainable Strategy for Piracy Management in Nigeria.” *Journal of Management and Sustainability* (Canadian Center of Science and

Education) vol. 3, issue 1 (2013): 119-128.
<http://dx.doi.org/10.5539/jms.v3n1p119>.

DUTTON, Yvonne M. "Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?" *Tulane Law Review* (Tulane University Law School) Vol 86, n° 5 (2011-2012): 1111-1162.
<http://ssrn.com/abstract=1931870>.

GATHII, James Thuo. "Kenya's Piracy Prosecutions." *The American Journal of International Law* vol.104, no. 3 (July 2010): pp. 416-436.

GUILFOYLE, Douglas. "The laws of war and the fight against Somali piracy: combatants or criminals?" *Melbourne Journal of International Law* vol. 11, no. 1 (May 2010): pp. 141(13).
<http://www.law.unimelb.edu.au/files/dmfile/download9cf01.pdf>.

—. "Counter-Piracy Law Enforcement and Human Rights." *International and Comparative Law Quarterly* vol. 59 (January 2010): pp. 141-169.

KISLANGANI, Emmanuel. "Somali pirates: villains or victims ?" *South African Journal International Affairs* Vol.17, no. 3 (December 2010):pp. 361-374.
<http://dx.doi.org/10.1080/10220461.2010.533529>

KONTORIVICH, Eugene. and ART, Steven. "An Empirical Examination of Universal." *American Journal of International Law* vol. 104, no. 3 (July 2010): 436-453.

KONTOROVICH, Eugene. "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists." *California Law Review* vol. 98, no. 1 (February 2010): pp. 243-276.

—. "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation." *Harvard International Law School* vol. 45, no. 1 (Winter 2004): 183-237.

KRAYTMAN, Yana Shy. "Universal Jurisdiction - Historical roots and Modern Implications." *BSIS Journal of International Studies* Vol 2, no.
<http://www.kent.ac.uk/brussels/documents/journal/2005/Kraytman%20-%20Universal%20Jurisdiction.pdf> (2005): 94-129.

<http://www.kent.ac.uk/brussels/documents/journal/2005/Kraytman%20-%20Universal%20Jurisdiction.pdf>.

OBOOKATA, Tom. "Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression." *The International Journal of Human Rights* Vol. 17, no. 1 (January 2013): 18-34.

PERCY, Sarah, SHORTLAND, Anja. "Contemporary Maritime Piracy: Five Obstacles to Ending Somali Piracy." *Global Policy* vol. 4, no. issue 1 (February 2013): pp. 65-72. <http://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12043/pdf>.

ROACH, J. Ashley. "Countering Piracy off Somalia: International Law and International Institutions." *American Journal of International Law* vol. 104, no. n. 3 (July 2010): 397-416.

Websites/Internet Sources

AMERI, Michele. "Current issues in the repression of piracy under international law." Presentation in World Oceans Day, Division for Oceans Affairs and the Law of the Sea, United Nations, New York, 17 May 2013. http://www.unfalumni.org/wp-content/uploads/2013/05/piracy_current-issues_2013.pdf.

BARRY, Laura and STAVELAND, Benjamin. "A Study in Maritime Piracy. advised by Oleg Pavlov." Report for the Degrees of Bachelor of Science, Faculty of the Worcester Polytechnic Institute, May 2009. http://www.wpi.edu/Pubs/E-project/Available/E-project-050709-150551/unrestricted/A_Study_in_Maritime_Piracy.pdf.

DE BONT, Saoirse. "Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective." *One Earth Future Foundation*. September 2010. <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>.

HESENOV, Rahim. "Universal Jurisdiction for International Crimes - A Case study." *Springer*. 16 December 2012. <http://link.springer.com/article/10.1007%2Fs10610-012-9189-8#page-1>.

- HURLBURT, Kaija, SEYLE, D. Conor [et al.]. *The Human Cost of Maritime Piracy* 2012. Report, project Oceans Beyond Piracy, One Earth Future Foundation, International Maritime Bureau and Maritime Piracy Humanitarian Response Programme, One Earth Future Foundation, 2013. <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.
- LEE, Andrew. "Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals." *One Earth Future Foundation* . 10 July 2010. <http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/Hybrid-Tribunals-Andrew-Lee.pdf>.
- MASOL, Sergii. "Jurisdictional Problems Relative to the Crime of Piracy off the Coast of Somalia." *Academia.edu*. n.d. http://www.academia.edu/1834079/JURISDICTIONAL_PROBLEMS_RELATIVE_TO_THE_CRIME_OF_PIRACY_OFF_THE_COAST_OF_SOMALIA.
- PILPG. "Applicability of Combatant Status to Pirates." Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. http://law.case.edu/war-crimes-research-portal/show_document.asp?id=320.
- PILPG. "Piracy Definitions in Domestic and Regional Systems." Legal Memorandum, Public International Law & Policy Group (PILPG), March 2013. https://www.google.pt/search?q=pirates&oq=pirates&aqs=chrome..69i57j0l5.1303j0j8&sourceid=chrome&espv=210&es_sm=93&ie=UTF-8#.
- SCHBLEY, Ghassan and ROSENAU, William. *Piracy, Illegal Fishing, and Maritime Insecurity in Somalia, Kenya, and Tanzania*. CNA Information Memorandum, Strategic Studies, CNA, CNA, November 2013. <http://www.cna.org/sites/default/files/research/IIM-2013-U-005731-Final3.pdf>.

Conventions

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
 Convention on the High Seas

European Convention on Human Rights
International Convenat on Civil and Politic Rights
United Nations Convention on the Law of the Sea
Vienna Convention on Consular Relations

Resolutions

UN Security Council Resolution 1816(2008) of 2 June 2008
UN Security Council Resolution 1838 (2008) of 7 October 2008
UN Security Council Resolution 1851 (2008) of 16 December 2008
UN Security Council Resolution 1918 (2010) of 27 April 2010
UN Security Council Resolution 2018 (2011) of 31 October 2011
UN Security Council Resolution 2039 (2012) of 29 February 2012
UN Security Council Resolution 2125 (2013) of 18 November 2013

IMO Resolution A.1025 (26) of 2 December 2009